92-1040

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1992

James Barber, et al.
Petitioners,

v.
Michael Horsey,
individually, et al.
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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DATE: November 30, 1992

ISSUES PRESENTED

The United States Supreme Court should grant certiorari for the following reasons:

1. The U.S. Court of Appeals for the Third Circuit ruling below is in direct conflict with precedent of the court of last resort for the Commonwealth of Pennsylvania on an issue of interpretation of state law incorporated into a federal statute on almost identical facts. See **Bentman** v. **Seventh Ward Democratic Executive Committee** 421 PA 188, 218 A.2d 261 (1966).

2. The holding below of the U.S. Court of Appeals for the Third Circuit conflicts with the holding of the U.S. Supreme Court in the lower courts refusal to apply the analysis of either **Erie Ry. Co** v. **Tompkins** 304 U.S. 64 (1938) or **Wilson** v. **Garcia** 472 U.S. 261 (1985).

3. The holding below of the U.S. Court of Appeals for the Third Circuit conflicts with the numerous holdings of the U.S. Supreme Court in the lower courts refusal to find that the denial of voting rights won in a state run party

primary is conduct taken under color of state law for the purposes of the Federal Civil Rights Law, 43 USCS §1983, §1988. See **Nixon** v. **Herndon** and other cases cited infra.

4. The application of the **Erie** Doctrine to the definition of "under color of state law" is one of first impression. Alternatively, the application of the standards of **Wilson** v. **Garcia** 471 U.S. 261 (1985) to the definition of "under color of state law" is need of clarification as demonstrated by the Third Circuit's refusal to discuss the case. Both legal precedents and their interplay with the Federal Civil Rights law are of major importance requiring resolution by the United States Supreme Court.

Issues on the merits to be presented include:

1. Were Respondents Michael Horsey individually and Robert Brady on behalf of Philadelphia County Democratic Executive Committee acting under color of state law when they deprived Appellants of their Free Speech and Equal Pro-

tection rights to cast political ballots? Answer: Affirmative.

2. Does the line of U.S. Supreme Court precedent from **Erie Ry. Co** v. **Tompkins** 304 U.S. 64 (1938) through **Wilson** v. **Garcia** 472 U.S. 261 (1985) with its standard for 42 USCS §1988 require that the Pennsylvania Supreme Court case of **Bentman** v. **7th Ward Democratic Executive Committee** 421 PA 188, 218 A, 2d 261 (1966) be incorporated as binding precedent in determining color of state law? Answer: Affirmative.

3. Alternatively, under federal law were Respondents acting in with conduct fairly attributable to state action so as to constitute action under color of state law; or did Respondents engage in a symbiotic relation in performing a government function sufficient to create color of state law? Answer: Affirmative.

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Barber et al. v. **Horsey et al.** USDC ED PA Civil # 91-4265 Memorandum Opinion entered December 4, 1991 and **Barber et al.** v. **Horsey et al.** US Third Circuit Court of Appeals Appeal # 91-2104 Memorandum Opinion filed July 17, 1992 and Denial of Rehearing dated August 31, 1992 are not officially reported.

STATEMENT OF JURISDICTION

Jurisdiction in the District Court was original jurisdiction over a federal civil rights claim, 42 USCS §1983 and 42 USCS §1988, and 28 USCS §1331 and 28 USCS §1343. The order of the District Court was entered on December 4, 1991.

Appellate jurisdiction to the Third Circuit Court of Appeals is based on a civil appeal from a judgment that is final as to all parties, 28 USCS §1291 and 28 USCS §1294. The order denying the appeal was filed on July 17,

1992. The order denying the motion for re-hearing was dated August 31, 1992.

The United States Supreme Court may grant certiorari to a U.S. Circuit Court of Appeals on a civil appeal pursuant to 28 USCS §1254.

I hereby certify that to the best of my knowledge and belief, the judgment in this matter is a final judgment as to all parties in accordance with 28 USCS §1291.

Robert J. Mulligan Esq.
Attorney for Appellants
James Barber et al.

TEXT OF U.S. CONSTITUTION

AMENDMENT 1

Religious and political freedom.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 14

Section 1. Citizens of the United States.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. Power to enforce amendment.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TEXT OF FEDERAL STATUTES

28 USCS §1254. Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgement or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions

are desired, and upon such certification the Supreme Court may give binding instruction or require the entire record to be sent up for decision of the entire matter in controversy.
(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P.L. 100-352, § 2(a), (b), 102 Stat. 662.)

28 USCS §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].
(June 25, 1948, ch 646, § 1, 62 Stat. 929; Oct. 31, 1951 ch 655. § 48, 65 Stat. 726; July 7, 1958, P.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, P.L. 97-164, Title I, Part A, § 124, 96 Stat. 36.)

28 USCS §1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
(June 25, 1948, ch 646, § 1, 62 Stat. 930; July 25, 1958, P.L. 96-486, § 2(a), 94 Stat. 2369.)

28 USCS §1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];
(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
(3) To redress the deprivation, under color of any State law, stature, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States of by and Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--
(1) the District of columbia shall be considered to be a State; and
(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(June 25, 1948, ch 646, § 1, 62 Stat. 932; Sep. 3, 1954 ch 1263. § 42, 68 Stat. 1241; Sept. 9, 1957, P.L. 85-315, Part III, § 121, 71 Stat. 637; Dec. 29, 1979, P.L. 96-170, § 2, 93 Stat. 1284.)

28 USCS §1652. State laws as rules of decision

The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948 ch 646. § 1,62 Stat. 944.)

42 USCS §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. §1979; Dec. 29, 1979, P.L. 96-170, 1, 93 Stat. 1284.)

42 USCS §1988. Proceedings in vindication of civil rights; attorney's fees

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a crimi-

nal nature in the infliction of punishment on the party found guilty.

TEXT OF STATE STATUTES

25 P.S. §2837. County committees; rules; other party officers

There may be in each county a county committee for each political party within such county, the members of which shall be elected at the spring primary, or appointed, as the rules of the respective parties within the county may provide. The county committee of each party may make such rules for the government of the party in the county, not inconsistent with law or with the State rules of the party, as it may deem expedient, and may also revoke, alter or renew in any manner not inconsistent with law or with such State rules, any present or future county rules of such party. No such rules shall be effective until a certified copy thereof has been filed in the office of the county board of elections. The members of all other party committees, and all other party officers whose election is required by the party rules, shall also be elected at the spring primary, in the manner provided by this act. 1937, June 3, P.L. 1333, art. VIII, § 807.

PHILADELPHIA COUNTY DEMOCRATIC PARTY RULES, AS OFFICIALLY FILED WITH PHILADELPHIA COUNTY BOARD OF ELECTIONS PURSUANT TO 25 P.S. §2837 (Relevant Portions).

Rule I Article 1. Any qualified elector, who is duly registered as a member of the Democratic party, shall be entitle to vote for Democratic candidates for party offices, delegates and alternate delegates to conventions and nominees for public offices at the primary elections, provided for by law.

Rule III Article 1 Election of County Committeeman and Ward Officers

Section A. The County Committeeman and all officers of the Ward Committee shall be elected at the time the new Ward Committee is organized on the third Monday succeeding the Primary Election, unless otherwise provided for in the rules.
Section B. At the Spring Primary there shall be elected in each division two persons, who shall serve, on and after the third monday succeeding their election, as members of the Ward Committee in which such division may be situated.

Article 2 Section B. The election of members of the County Committee shall be held on the third Monday succeeding the Primary Election at which the members of the Ward Committee were elected, unless otherwise provided for in the rules.
Section C. Each Ward Committee shall at the time of its re-organization elect, not necessarily from its own membership, one representative to the County Committee. Such person, however, must be an elector of the ward he is to represent.

Rule IV Meetings
Article 1 Ward Committee Meetings
Section A. At 8:00 P.M., on the third Monday succeeding the Primary Election at which members of the Ward Committee were elected, all persons claiming the right of membership in the Ward Committee shall meet at the place designated to organize the new Ward committee, unless the newly elected members of the Ward committee are unable to obtain their certificates of nomination to the Ward Committee by twelve o'clock noon of the said third Monday. In such event, the meeting of the Ward Committee shall be delivery of the certificates of nomination to those [sic.] postponed until the Monday evening following the [sic.] entitled to receive the same.

Rule V ORGANIZATION PROCEDURE

Article 1 Procedure in Organizing Ward Committees

Section A. The last preceding County Committeeman of the ward shall be the presiding Chairman at the organizing of the new Ward Committee. ... In the event of the inability or refusal of the previous County Committeeman to act or upon his failure to have notified the Democratic County headquarters of his intention to act, then it shall be the duty of the person who organizes the County Committee to have the preceding Ward Chairman preside, if available and willing to act, and if not, to have the next succeeding officer, etc., until a person is obtained to organize the Ward Committee.

Section B. The Chairman who conducts the meeting for organizing the new Ward Committee shall proceed in regard to the acceptance of certificates of nomination, seating the parties claiming membership in the Ward Committee against whom no contest has been filed, the appointment of acting secretaries, sergeant-at-arms, tellers, in the same manner as provided for in the organization of the County Committee.

Section C. The Chairman shall also handle contests in the same manner as provided for in the handling of contests by the County Committee. The Ward Committee cannot be organized until all contests have been disposed of.

Section D. All contests must be disposed of and the Ward Committee organized on or before the Wednesday preceding the Monday evening on which the County Committee is to be organized.

Section E. Failure on the part of any Ward Committee to organize at this time and to elect a County Committeeman shall constitute a vacancy of a County Committeeman from the Ward. In such cases, the election of a County Committeeman, as well as the organization of the Ward Committee, shall be referred to the Committee on Organization of the County Committee. This failure shall not be considered as a contest nor prevent the organization of the County Committee.

Section F. After all contests have been heard by the Contest Committee, and all duly elected members have been seated, the meeting shall proceed with the election of officers in the manner as hereinafter set forth for the County Committee, with the exception of the officers to be elected and the order in which they are to be elected.

Section G. The officers to be elected and the order in which they are to be elected are: The County Committeeman and the Permanent Chairman....The Permanent Chairman having been elected, the new Permanent Chairman shall then proceed to conduct the election of the remaining officers: First, Second and Third Vice Chairmen, Secretary, Assistant Secretary, Treasurer and Assistant Treasurer.

Section H. All of the above offices must be elected from the membership of the Committee with the exception of the County Committeeman....

Article 2 Procedure in Organizing County Committee

Section E. All contests having been decided, and those entitled to membership in the County Committee having been seated, the Committee shall them proceed with the election of the officers of the County Committee and the completion of its organization. The Committee shall proceed to the nomination and election for the office of County Chairman. Should there be more than one person nominated, the voting shall proceed in accordance with the rules hereinafter set forth. The tellers shall tabulate and record the votes, as cast by the members. After the tellers have agreed, the Chairman shall announce the results of the voting and declare the one who received the highest number of votes to be elected Chairman of the County Committee. ...

Rule XI VACANCIES

ARTICLE 1 METHOD OF FILLING

SECTION A. Vacancies existing or occurring on the Democratic ticket after the date of a Primary, or created after a Primary by the death, resignation or removal from office of an incumbent elected official, and nominations for candidates to be voted for at special elections to fill vacancies when, under the Election Code of 1937 and supplements and amendments thereto, a primary nomination is impossible (i.e. when special elections are not held at the time of regular elections and when such vacancy occurs or exists within (60) days of the regular primary antecedent to such regular election) shall be filled as follows: In the case of county and city officers, by the County Executive Committee; in the case of members of Congress, delegates to the National Convention, State Senators and Councilmen, upon the recommendation of the District caucus in which the vacancy exists or happens. In the case of State Representatives where the district is composed of one ward, the vacancy shall be filled on the recommendation of the ward Committee at a special meeting held for that purpose. Where more than one ward comprises the legislative district, the vacancy shall be filled at a joint meeting of all ward committees in the said legislative district. In the case of members of the State Committee the vacancy shall be filled by a caucus of the Senatorial district in which the vacancy exists.

Section B. All other vacancies, inclusive of those for which a special election is required to fill vacancies in the office of Representative in Congress, Senator and Representative in General Assembly and member of City Council, for which the law provides that candidates therefore shall be nominated by political parties by means of nomination certificates, shall be filled upon the recommendation of the district caucus in which the vacancy exists or happens, as hereinafter provided.

STATEMENT OF CASE

PROCEDURAL HISTORY

Petitioners James Barber et al. filed a federal civil rights complaint, pursuant to 28 USCS §1343, with the Eastern District of Pennsylvania on July 3, 1991 alleging that the actions of Respondents Michael Horsey individually and Democratic City Committee have caused and continue to cause the destruction of the Equal Rights of Free Speech and Free Assembly and One Person One Vote possessed by the Petitioners Barber et al. as guaranteed by the First Amendment and Fourteenth Amendment of the United States Constitution in violation of 42 USCS §1983. The complaint seeks damages from Defendant Horsey and an injunction against Robert Brady on behalf of Philadelphia County Democratic Executive Committee.

Respondents filed a joint motion to dismiss under F.R.C.P. 12(b) on the grounds that the alleged fraudulent acts of Respondent Horsey and their ratification by Respondent

Democratic City Committee were not under color of state law as defined in 42 USCS §1983.

On December 27, 1991, U.S. District Judge Newcomer granted the motion and dismissed the case without further proceedings. Petitioners Barber et al. then appealed.

On June 23, 1992, the above matter was referred to a three judge appeal panel on the briefs alone pursuant to Third Circuit Local Rule 12(6). The decision, written by Judge Hutchinson, was filed by the panel on Friday, July 17, 1992 denying the appeal. From that appeal panel ruling, Petitioners Barber et al. were granted an extension of time by order dated August 4, 1992 and subsequently filed a motion for rehearing and a suggestion for an en banc hearing on August 14, 1992.

On August 31, 1992, the motion for rehearing and request for en banc hearing were denied. Plaintiffs James Barber et al. now petition the United States Supreme Court for certiorari.

STATEMENT OF FACTS

Petitioners James Barber et al. were elected Democratic committeepersons in the 6th Ward in Philadelphia in the Spring primary election of 1990.

The Democratic Party Rules provide that the election of new ward officers for a four year term is to take place at the ward reorganization meetings which is held on the third Monday after the election of committeepersons. The party rules regarding the selection of ward committeepersons and county committeepersons (i.e. ward leaders) are incorporated into the Pennsylvania Election Code as law, 25 P.S. §2837. In this case the ward reorganization meeting took place on June 4, 1990 at 8 p.m. At this first official meeting of the 6th Ward Democratic Committee after the election, Petitioners Barber et al. were present but were denied the opportunity to vote for a new ward leader and other ward officers when Respondent Michael Horsey, who was conducting the meeting,

proclaimed himself reelected as ward leader without allowing the Petitioners and their allied committeepersons to vote as required by the party rules. Respondent Horsey refused to permit the elected Petitioners James Barber et al. and a plurality of the elected committeepersons present to vote for ward officers. After proclaiming himself 6th Ward Democratic Ward Leader, Respondent Horsey then appointed the other ward officers by "Royal Fiat" without an election in violation of and the Pennsylvania Election Code, Democratic Party rules and state law.

If the Petitioners Barber et al.'s votes been counted on June 4, 1990, Respondent Horsey would not have become 6th Ward Democratic Ward leader nor would the other purported 6th Democratic ward officers have been chosen. Instead candidates whom the Petitioner committeepersons supported would have been elected instead. In particular, Petitioner James Barber would have

been elected Democratic Ward Leader of the 6th Ward.

When Petitioners petitioned Respondent Democratic City Committee to overturn the action of Respondent Horsey and hold an election under the Democratic Party Rule's incorporated into Pennsylvania law, Respondent City Committee refused and certified Respondent Horsey as 6th ward leader. In short Respondent Horsey stole an election by proclaiming himself reelected as ward leader.

RELATED CASES NONE.

PETITIONERS BARBER ET AL. PETITION IN SUPPORT OF GRANTING CERTIORARI TO THE UNITED STATES SUPREME COURT

ARGUMENT

1. INTRODUCTION

There is no legal case of more exceptional importance than that which defends our most basic political liberties from corruption that would destroy the voice of the vote. Such is the case at bar of **Barber** v. **Horsey**.

The facts of the case are straightforward. Plaintiffs were chosen by Democratic voters to be local Democratic committeepersons at the state run publicly held primary election in Pennsylvania in the Spring of 1990.

Party committeeperson are chosen at a single election in Pennsylvania's closed primary. They are elected two per precinct, called "divisions" in Philadelphia, for a term of four years as prescribed by the Democratic Party rules which are incorporated into the Pennsylvania State Election Code, 25 P.S. §2837, and which have the force of law. The rules of all

parties on the ballot are on file with the county boards of election as public record, 25 P.S. §2837.

The elected committeepersons, two per division, meet in their respective wards on the Monday night three weeks after their election to cast the vote to chose the ward leader, officially called the county committeeperson. The ward leader is a politically powerful individual. Among the official duties of the ward leader are to cast a vote with other ward leaders for filling any candidate vacancies which occur between the primary and general elections, presiding at the official ward reorganization meeting at which the committeepersons are formally seated, as well as the usual functions of distributing election day monies and voting for endorsements of candidates for all offices.

When plaintiffs and other elected committeepersons assembled at the first meeting of Philadelphia's 6th Ward to elect the Democratic

ward leader and other ward officers, the incumbent ward leader, Defendant Michael Horsey, staged a coup d'etat and chose himself and the other ward officers without a vote, contrary to the rules of the Democratic Party which are incorporated into state law by the Pennsylvania State Election Code, 25 P.S. §2837.

The election was not merely stolen, it was destroyed. Plaintiff committeepersons brought suit in U.S. District Court to regain their voting rights under the Federal Civil Rights Act. When faced with the perversion of democracy, the U.S. District Court declared that the remedy for such misconduct was beyond the purview of the federal courts because the action was beyond "color of state law" under the federal civil rights statute, 42 USCS §1983. A three judge panel of the third circuit affirmed. Motions for rehearing and for an en banc hearing were denied.

When the court below sanctions such corruption by refusing to remedy it, and our funda-

mental political liberties suffer as a result, the case cries out for just review at the highest level. As the United States Supreme Court has written:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear.... The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. **Reynolds** v. **Sims** 377 U.S. 533 at 561-562 (1964)

The trunk of the American tree of Liberty is the federal Civil Rights statute. If the federal civil rights statute was not designed to defend our most fundamental of rights, namely accurate political representation, then it becomes a hollow branch on which to rest any other right. Without judicial defense of political voting rights of those chosen directly by the people at a basic level, all other po-

litical civil rights wither like rotted parchment.

2. THERE EXISTS A DIRECT CONFLICT IN PRECEDENT BETWEEN THE PENNSYLVANIA SUPREME COURT AND THE FEDERAL THIRD CIRCUIT COURT OF APPEALS.

The Pennsylvania Supreme Court gave its interpretation of under color of Pennsylvania state law in its civil rights decision in **Bentman** v. **Seventh Ward Democratic Executive Committee** 421 Pa. 181, 218 A. 2d 261 (1966), on facts identical to those at bar. In **Bentman**, a Democratic ward leader in Philadelphia refused to seat committeepersons or to let them vote at the ward reorganization meeting. The Pennsylvania Supreme Court ruled that a civil rights violation had been made out. The court wrote in support of its holding:

> Insofar as a political party performs statutorily imposed public functions and to the extent that its actions constitute state action, the internal organization of such political party is a matter of such concern to the public as to make it subject to constitutional limitations and judicial restraints. When the internal organization

> of a political party directly affects its performance of such public functions then not only may the judiciary intervene but it must intervene....
> **Bentman** v. **Seventh Ward Democratic Executive Committee** 421 Pa. 188 at 196 (1966)

The opinion of the appeals panel here readily recognizes the conflict between the Pennsylvania Supreme Court and the later ruling of the U.S. District Court in **McMenamin** v. **Philadelphia County Democratic Executive Committee of Philadelphia** 405 F. Supp. 998 (ED PA 1975). The appeals panel equated **McMenamin** with the Third Circuit case **Lynch** v. **Torquato** 343 F.2d 370 (CA3 1965) which the panel found controlling. The panel failed to distinguish **Lynch** v. **Torquato** which approved the discretion of political parties to write rules from **McMenamin** which improperly denied civil rights caused by a violation of legally adopted rules.

As the appeals panel noted, this case is ripe with conflicting interpretations of the same statutory language by the Pennsylvania Supreme Court and the U.S. District Court in **McMenamin**:

> It is unfortunate that there is a conflict between the decisions of the highest court of the Commonwealth of Pennsylvania and the decisions of this Court concerning federal civil rights law. Nevertheless, this panel is controlled by the decisions of this Court concerning federal law and not by differing interpretations advanced by state courts.
> [Page 4 of the Third Circuit panel opinion at Appendix R.66-67]

The federal appeals panel here chose not to respect Pennsylvania's definition of the extent of its own state law. The federal courts below gave the civil rights statute a crimped and narrow interpretation instead by dismissing the current suit on Defendant Horsey's Rule 12 motion before an answer was filed. Such direct conflict of such important legal issues by two such high courts mandates U.S. Supreme Court review.

3. THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT FAILED TO FOLLOW U.S. SUPREME COURT PRECEDENT OF ERIE V. TOMPKINS WHICH REQUIRES THE INCORPORATION OF STATE LAW DEFINITION OF UNDER COLOR OF STATE LAW UPON THE FACTS OF THIS CASE.

Not only do our political rights disappear in the appeals panel ruling but likewise so does the concept of federalism vanish with the constrained interpretation of "under color of state law." The definition of state law is inherently a state issue. Such is the basic holding of the famous decision in **Erie Ry. Co** v. **Tompkins** 304 U.S. 64 (1938). The determination of what conduct constitutes "under color of state law' is likewise heavily, if not totally, dependent on the definition of state law.

> The Erie rule remains a vital expression of the federal system and the concomitant integrity of the separate States.
> **Ferens** v. **John Deere Co.** 494 U.S. 516, 108 L.Ed.2d 443, 110 S.Ct. 1274 (1990)

The conflict of outcome between the Pennsylvania Supreme Court and the U.S. Third Circuit Court of Appeals ruling here is precisely the type of evil that **Erie** was designed to avoid.

> In essence, the intent of [the Erie] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.
> **Guaranty Trust Co.** v. **York** 326 U.S. 99, at 109, 89 L.Ed. 2079, 65 S.Ct. 1464, 160 ALR 1231 (1945).

Although most frequently applied to diversity cases, the **Erie** doctrine applies any time that a state substantive law is incorporated into a federal statute. The U.S. District Court below erroneously ruled that the **Erie** doctrine applies only to diversity cases (Appendix R. 48). The Third Circuit Court of Appeals reasoned that there was not state law incorpo-

rated here (App. R.67). Contrary to the ruling below here, the U.S. Supreme Court has used the **Erie** doctrine in nondiversity cases:

> [I]t is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. See, Hart & Wechsler, the Federal Courts and the Federal System (1953) 690-700. Thus the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.
> **Wichita Royalty Co.** v. **City National Bank** 306 U.S. 108 (1939).

In **Commissioner** v. **Bosch**, 387 U.S. at 456 (1966), the U.S. Supreme Court held:

> This is but an application of the rule of **Erie R. Co.** v. **Tompkins**, **supra**, where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, **viz.**, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. **Commissioner** v. **Bosch**, 387 U.S. at 456 (1966).

As Justice Scalia has noted in a more recent concurring opinion, the **Erie** doctrine is not confined merely to diversity cases but applies

to other federal cases in which state law is incorporated into federal statutes:

> Contrary to the **DelCostello** Court's claim, however, neither our decision in **Erie R. Co.** v. **Tompkins**, 304 U.S. 64 (1938), nor the Rules of Decision Act scholarship underlying it in any way required that change. Neither remotely established that statute applies only in diversity cases. See Hill, The **Erie** Doctrine in Bankruptcy, 66 Harv. L. Rev. 1013, 1033-1034 (1953); see also **DelCostello** v. **Teamsters** [462 U.S.151 (1938)] at 173, n.1 (STEVENS, J., dissenting)(noting that "'the [Act] itself neither contains nor suggests ...a distinction '" between diversity and federal-question cases, quoting **Campbell** v. **Haverhill**, 155 U.S. 610, 616 (1895); Friendly, In Praise of **Erie** -- And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 408, n. 122 (1964) (characterizing the view that **Erie** requires application of state law only in diversity cases as an "oft-encountered heresy"].
> **Agency Holding Corp.** v. **Malley-Duff & Assocs.** 483 U.S. 143 at 165, ftnt. 2. (1987).

The leading case from the second circuit, - **Maternally Yours** v. **Your Maternity Shop** 234 F. 2d 538, 540 n.1 (CA2 1956)[1] has been cited with

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[1] Despite the footnote's claim that the application of **Erie** in the **Maternally Yours** case was unnecessary for the disposition of that case, the court nevertheless did apply what it held to be controlling substantive New York state unfair competition law as

approval by both the United States Supreme Court, **Bosch** supra, and the Third Circuit Court of Appeals **Hamilton** v. **Roth** 624 F.2d 1204 at 1210 (1980). Ironically it was the Third Circuit Court of Appeals that gave a very clear expression of the scope of the **Erie** doctrine:

> The principle of **Erie** is that federal courts adjudicating rights conferred by state law must do so through the application of substantive state law. The **Erie** doctrine in no sense varies with the particular basis of jurisdiction through which state-created causes of action make their way into federal court. The **Erie** principle is concerned not with the source of the source of federal jurisdiction, but rather with the source of the rights being adjudicated: state-created rights must be determined in accordance with state law....The concerns of forum shopping and countervailing federal considerations are, of course, relevant to the initial determination whether **Erie** requires the application of a state rule by a federal court adjudicating a state law claim. But having once made the determination that state law must be applied, the mere assertion of a different jurisdictional basis cannot require either a redetermination of those factors, or a different result.
> **Hamilton** v.**Roth** supra at 1210.

---

incorporated through a federal statute in order to sustain the lower court's injunction.

The Federal courts cannot rewrite the scope of state law. Federalism means a power sharing between the states and the federal government. It would be a rebuke of federalism for the federal courts to contract the scope of the civil rights granted by the state supreme court precedent contrary to the larger purpose of civil rights as expressed in **Sullivan** v. **Little Hunting Park** 396 U.S. 229, 405. S. Ct. 400, 242 L.Ed.2d 386 (1969).

The appeals panel opinion does not resolve the conflict between Pennsylvania's court of last resort and the federal courts. Instead the appellate opinion engages in the tautology that the federal civil rights law is federal civil rights law and does not discuss whether the federal law incorporates any state substantive law. According to the appeal panel reasoning, a federal court can dictate to a state what the definition of state law is when the state law in incorporated into a federal statute.

4. THE COURTS BELOW REFUSED TO FOLLOW THE UNITED STATES SUPREME COURT PRECEDENT OF WILSON v. GARCIA, 471 U.S. 261 (1985) WHICH REQUIRES THE INCORPORATION OF STATE LAW DEFINITION OF UNDER COLOR OF STATE LAW.

The legal conclusion that Pennsylvania's highest court precedent definition of "under color of state law" should be adopted or "borrowed" into the federal Civil Rights Law derives not only from **Erie**, but has statutory support in the civil rights statute itself, 42 USCS §1988, which reads in relevant part:

> **Sec. §1988. Proceeding in vindication of civil rights; attorney's fees**
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS,"... for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is

> not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause....

The appeals panel did not discuss the above statute in its opinion. Such an important part of the civil rights statute cannot be avoided especially a statute so recently reviewed during the 1991 amendments by the United States Congress.

The recent major United States Supreme Court precedent, **Wilson** v. **Garcia** 471 U.S. 261 (1985-), interpreted this statute, as well as set down the standards for "borrowing" a state statute or precedent into federal law. In **Wilson** the United States Supreme Court held that §1988 of the Federal Civil Rights Act provided a specific standard for deciding whether state law was incorporated into federal law. In ruling that state personal injury statutes of limitation applied to Federal Civil Rights cases, the U.S. Supreme Court wrote:

> Rooted as it is in the expectations of Congress, the "state-borrowing doctrine" may not be lightly abandoned. We have de-

> scribed federal borrowing as "a closely circumscribed exception," to be made "only 'a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" **Reed v. United Transportation Union**, 488 U.S. 319, 324 (1989), quoting **DelCostello**, 462 U.S., at 172.

The **Wilson** analysis begins with an examination of whether the federal statute preempts state law or provides an explicit statutory definition. No specific definition of "under color of state law" is given in the Federal Civil Rights statute. By its very nature, it is a contradiction in terms to incorporate 50 different state statutory laws into federal law without a major incorporation of state law precedent to define the scope and extent of those laws.

The second step in the **Wilson** standard is to determine if the state law precedent is consistent with the purpose of the federal statute.

> In enacting 42 U.S.C. §1988 Congress determined that gaps in federal civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law....This tradition of borrowing analogous limitations statutes,... is based on a congressional decision to defer to "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." [citing **Wilson** v. **Garcia** supra.] **Hardin** v. **Straub** 490 U.S. 536 at 538 (1988)

Certainly Pennsylvania's protection of voting rights won at its state run primary are a furtherance of federal First Amendment right of political Free Speech and Fourteenth Amendment right of Equal Protection of political representation.

The final step in the **Wilson** approach is to examine that there is no conflict between the state law precedent and the federal statute. Plainly the **Bentman** precedent of the Pennsylvania Supreme Court is not in conflict with the purposes of political Free Speech and Equal Representation mentioned above.

The **Wilson** v. **Garcia** precedent was not examined at all nor were its standards employed by

the federal courts below in the case even thought raised in both appellants' briefs before the U.S. District and U.S. Third Circuit Courts. Because the Third Circuit Court of Appeals did not even attempt to discuss the **Wilson** precedent, the analysis of the court below is flawed and requires U.S. Supreme Court intervention.

The United States Supreme Court must resolve this issue. Certiorari to the United States Supreme Court is clearly needed to resolve such an important issue as to whether a state can expand its definition of under color of state law and its definition of civil rights.

5. ALTERNATIVELY, THE FEDERAL COURT OF APPEALS FOR THE THIRD CIRCUIT FAILED TO FOLLOW THE NUMEROUS U.S. SUPREME COURT PRECEDENTS, INCLUDING SUCH CASES AS NIXON V. HERNDON AND CLASSIC V. U.S., WHICH HOLD THAT PARTY PRIMARY ELECTIONS ARE NOT "PRIVATE AFFAIRS" BUT ARE DONE "UNDER COLOR OF STATE LAW" AS DEFINED BY THE FEDERAL CIVIL RIGHTS LAW.

The appeals panel felt bound by the prior **McMenamin** ruling despite the wealth of U.S. Supreme Court precedent holding that party primaries are not private affairs under the federal civil rights statute, **Smith** v. **Allwright** 321 U.S. 649, 88 L. Ed 987, 64 S.Ct. 757 reh den 322 U.S. 769, 88 L.Ed. 1594, 64 S.Ct 1052 (1944); **Terry** v. **Adams** 345 U.S. 461, 97 L.Ed 1152, 73 S.Ct. 809 reh den 345 U.S. 1003, 97 L.Ed 1408, 735 S.Ct. 1128 (1953); **American Party of Texas** v. **White** 415 U.S. 767 (1974); **Moore** v. **Ogilvie** 394 U.S. 814 (1969); **Williams** v. **Rhodes** 393 U.S. 23 (1968); **Nixon** v. **Herndon** 273 U.S. 536 (1927), 71 L.Ed. 759, 47

S.CT. 466; **Nixon** v. **Condon** 286 U.S. 73 (1932), cited with approval **Reitman** v. **Mulkey** 387 U.S. 369, 87 S.Ct 1627, 18 L.Ed.2d 830 (1967); **Ray** v. **Blair** 343 U.S. 214 (1952). One appeals panel cannot ordinarily overrule another, Third Circuit Internal Operating Procedures 9.1, although conflict with above U.S. Supreme Court precedent would have provided the opportunity. At this stage, only U.S. Supreme Court review can definitively decide this important conflict of the major precedents.

6. CONCLUSION

The case at bar of **Barber et al.** v. **Horsey et al.** and the **McMenamin** precedent, upon which the **Barber** holding is based, should be reviewed and overruled because: A)they ignore numerous U.S. Supreme Court precedents holding that state conducted primaries are under color of state law for civil rights cases; B) **McMenamin** confuses the discretion granted to political parties in **Lynch** v. **Torquado** to make rules with

the denial of civil rights caused by a violation of legally adopted rules; C) **McMenamin** makes no thorough analysis of either 42 U.S. 1988 nor the **Erie** doctrine as required by the U.S. Supreme Court's opinion in **Wilson** v. **Garcia**, supra. The lack of analysis of 1988 or **Erie** alone make **McMenamin** a weak shore upon which to scuttle the vessel of our most valuable and most important civil rights.

Most fundamentally, the **McMenamin** case and the ruling by the appeals panel below ignore the United States Supreme Court often stated precedent that the civil rights statute is to be liberally construed **U.S.** v. **Price** 383 U.S. 787 at 801 (1966). It has become fashionable in some federal courts not to enforce the civil rights laws through the ruse of a narrow construction by splitting the civil rights statute into isolated pieces. The civil rights statute is analogous to the human genome --in totality it has a magnificent structure and purpose. But keep cutting the DNA molecules into smaller

and smaller pieces and you are left not with smaller genes, but no genes at all, only molecule fragments and bare atoms which contain no genetic information or purpose.

Likewise, if portions of the federal civil rights statute are interpreted in isolation, if section 1983 is read apart from 1988, if "under color of state law" is defined without reference to state law as contained in state supreme court precedent, you are left not with smaller civil rights, but no rights at all.

The case at bar is similar to race discrimination cases before 1954. Hair splitting interpretation of language were used to prevent a discussion of the larger right at stake. Just as **Brown** v. **Board of Education** 347 U.S. 483 (1954) integrated the fragmented precedents and statutes into a coherent larger purpose, today so must the civil rights statutes be viewed in the context of political rights and freedoms. There is no question that these political rights for the plaintiff committee-

persons to express their choice, **Lubin** v. **Panish** 415 U.S. 709 at 716 (1974), and cast a ballot, **Reynolds** v. **Simms** 377 U.S. 533 (1964), rank among the most important rights that the judiciary can protect, **Dunn** v. **Blumstein** 405 U.S. 330 (1972).

The district court and appeals panel protestation that they are not endorsing the corruption of our democracy had a distinctly hollow ring in a city where a Liberty Bell once rang proudly. As the oft quoted political maxim recites, "All that is necessary for evil to triumph is for good men to do nothing."[2] The amber waves of grain of a free society will quickly wither if the attack on grass roots political freedom that Defendant Michael Horsey's conduct presents is left unchecked.

It would be historically and tragically ironic that when so many peoples around the world are struggling, fighting and dying for a

---

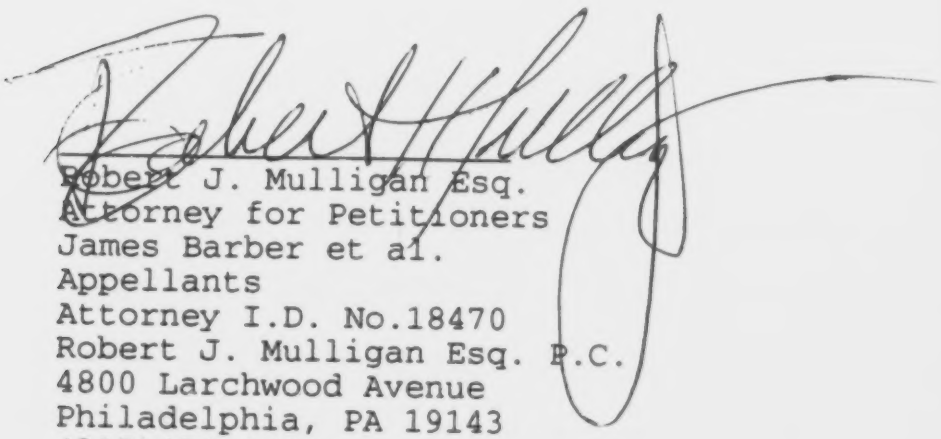
[2] Anonymous but often erroneously attributed to Edmond Burke.

mere taste of democracy, that our federal courts would rule that an appeal of lost political rights is not important enough to be heard, especially when there is so much precedent of the U.S. Supreme Court and Pennsylvania Supreme Court on the one hand, conflicting with the Third Circuit's use of the **McMenamin** line of reasoning on the other.

The bottom line is the **McMenamin** was decided wrongly and should be overruled for not adopting the incorporation of state law analysis for 42 USCS 1988 as put forward in **Wilson** v. - **Garcia**, supra., as well as the closely related doctrine of **Erie Ry. Co.** v. **Tompkins**, all supra.

When the jurisdictional path exists, as it does here, to restrain such an outrageous violation of Petitioners' rights, temerity on the part of the courts to address a "political controversy" becomes an endorsement of wrongdoing.

Certiorari hearing and argument should be granted because the legal issues are too important and the conflict between Pennsylvania's highest state court and the U.S. Third Circuit Court of Appeals too deep to be ignored.



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DATE: November 29, 1992

IN THE
Supreme Court of the United States
February Term, 1993

James Barber, et al.
Petitioners,

v.

Michael Horsey,
individually, et al.
Respondent,

CERTIFICATION OF SERVICE

I, ROBERT J. MULLIGAN ESQ., hereby certify that I have served copies of the APPELLANTS BARBER ET AL. PETITION FOR A WRIT OF CERTIORARI and APPENDIX upon the Appellees Horsey et al. counsel in the above captioned matter, by mailing a copy first class mail on November 29, 1992, addressed to:

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---

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(2)

92-1040

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

James Barber, et al.
Petitioners,

v.

Michael Horsey,
individually, et al.
Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX

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DATE: November 30, 1992

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GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 91-2104
Filed: 12/31/91
Nsuit: 3441
Civil Rights: Voting
Barber, et al v. Horsey, et al
Appeal from: Eastern District of Pennsylvania

- -

Lower court information:

District: 0313-2 : 91-04265
Trial Judge: Clarence C. Newcomer,
District Judge
Date Filed: 7/3/91
Date order/judgement: 12/4/91
Date NOA filed: 12/27/91

- -

Fee status: paid
-- -- -- --
Prior cases:
None
Current cases:
None

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91-2104 Barber et al v. Horsey et al

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[COR NTC ret]

ALFONZO CAREY
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Robert J. Mulligan Jr.
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[COR NTC ret]

BEATRICE DUNSTON
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

TIJUANA KNOX
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

WILLIAM S. MARTIN
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

MICHAEL C. MCCLEARY
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

CHARLES E. MYERS
Appellant
Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

HARRY L. ROBINSON JR.
Appellant
Robert J. Mulligan Jr
(See above)
[COR NTC ret]

DONITA E. ULMER
Appellant — Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

ESSIE M. WILLIAMS
Appellant — Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

ELSIE L. WISE
Appellant — Robert J. Mulligan Jr.
(See above)
[COR NTC ret]

MEE JIN YOUK — Robert J. Mulligan Jr.
Appellant — (See above)
[COR NTC ret]

Docket as of October 22 1992 1:01 pm
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Proceedings include all events.
91-2104 Barber, et al v. Horsey, et al

v.

MICHAEL HORSEY Appellee	Stephen J. Springer 215-561-4400 [COR NTC ret] LaBrum & Doak 1818 Market Street 29th Floor Philadelphia, PA 19103
ROBERT BRADY, On behalf of Philadelphia Democratic County Executive Committee, an unincorporated association Appellee	Stephen J. Springer (See above) [COR NTC ret]

Proceedings include all events
91-2104 Barbers et at v. Horsey, et at

JAMES BARBER, (9th Div.), FRED BRANDON, (18th Div.), ALFONZO CAREY, (18th Div.) BEATRICE DUNSTON (16th Div.), TIJUANA KNOX, (1st Div.), William S. MARTIN, (9th Div), MICHAEL C. MCCLEARY, (5th Div.), CHARLES E. MYERS, (7th Div.) HARRY L. ROBINSON, JR., (8th Div.) DONITA B. ULMER, (10th Div.), ESSIE M. WILLIAMS, (5th Div.), ELSIE L. WISE, (1st Div.), MEE JIN YOUK, (8th Div.)

v.

MICHAEL HORSEY, ROBERT BRADY, on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE,
AN UNINCORPORATED ASSOCIATION

JAMES BARBER; FRED BRANDON; ALFONZO CAREY; BEATRICE DUNSTON; TIJUANA KNOX; WILLIAM S. MARTIN; MICHAEL C. MCCLEARY:
CHARLES E. MYERS; HARRY L. ROBINSON, JR , DONITA E. ULMER ESSIE M. WILLIAMS; ELSIE L. WISE; MEE JIN YOUK,

Appellants

Proceedings include all events.
91-2104 Barber, et al v. Horsey, et al

12/31/91	CIVIL CASE DOCKETED. Notice filed by James Barber, Fred Brandon, Alfonzo Carey, Beatrice Dunston, Tijuana Knox, William S. Martin, Michael C. McCleary, Charles E. Myers, Harry L. Robinson, Jr., Donita E. Ulmer, Essie M. Williams, Elsie L. Wise, Mee Jin Youk. (sma)
12/31/91	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 2/10/92 (sma)
12/31/91	TRANSCRIPT PURCHASE ORDER (PART I), no proceedings in District Court. (ghb)
1/13/92	APPEARANCE from Attorney Robert J. Mulligan on behalf of Appellants, filed. (dlr)
1/13/92	DISCLOSURE STATEMENT on behalf of Appellants, filed. (dlr)
1/13/92	INFORMATION STATEMENT on behalf of Appellants, received. (dlr)
1/13/92	FOLLOW UP LETTER to Stephen J. Springer requesting the following documents: **Appearance Form **Disclosure Statement (dlr)
1/17/92	APPEARANCE from Attorney Stephen J. Springer on behalf of Appellees Michael Horsey and Robert Brady, filed. (dlr)

1/17/92	DISCLOSURE STATEMENT on behalf of Appellees Michael Horsey and Robert Brady, filed. (dlr)
1/21/92	CERTIFIED LIST filed. (ghb)
2/10/92	BRIEF on behalf of Appellants, Pages: 23, Copies: 10, Delivered by mail, filed. Certificate of service date 2/10/92. (wab)
2/10/92	APPENDIX on behalf of Appellants Copies: 5 Volumes: 1, Delivered by mail, filed. Certificate of service date 2/10/92. (wab)
3/16/92	BRIEF on behalf of Appellee Michael Horsey, Appellee Robert Brady, Pages: 19, Copies: 10, Delivered by mail, filed. Certificate of Service date 3/16/92. (wab)
4/1/92	CALENDARED for Tuesday, June 23, 1992. (wab)
6/23/92	SUBMITTED 6/23/92 Coram: Hutchinson, Cowen and Alito, Circuit Judges. (agb)
7/17/92	MEMORANDUM OPINION (Hutchinson, Authoring Judge, Cowen and Alito, Circuit Judges), filed. (bj)
7/17/92	JUDGMENT: AFFIRMED. Costs taxed against appellants, filed. (bj)

Proceedings include all events.
91-2104 Barber, et al v. Horsey, et al

8/3/92	MOTION filed by Appellants to extend time to file petition for rehearing en banc to and including 8/14/92. Certificate of Service dated 8/3/92. (bj)
8/4/92	ORDER (Clerk) granting motion to extend time to file petition for rehearing en banc by Appellants, Extension granted to 8/14/92, filed. (bj)
8/14/92	PETITION by Appellants for rehearing in banc. (rec'd in D. C. nightbox on 8-14-92 @ 11.44pm, and rec'd in USCA on 8-17-92) Certificate of service dated 8/14/92, filed.(bj)
8/31/92	ORDER filed (Sloviter, Chief Judge, Stapleton, Yansmann, Greenberg, Hutchinson, Authoring Judge, Scirica, Cowen, Nygaard, Alito and Roth, Circuit Judges) denying petition for in banc rehearing by Appellant James Barber.(bj)
9/8/92	MANDATE ISSUED, filed. (bj)
9/8/92	RECORD released. (bj)

Docket as of October 22, 1992 1:01 pm
Page 6

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER (9th Div.) 802 North 40th Street Philadelphia, PA 19104 and FRED BRANDON (18TH Div.) 1009 North 46th Street Philadelphia, PA 19131 and ALFONZO CAREY (18th Div.) 1020 North 46th Street Philadelphia, PA 19131 and BEATRICE DUNSTON (16TH Div.) 4633 Ogden Street Philadelphia, PA 19139 and TIJUANA KNOX (1st Div.) 4061 Filbert Street Philadelphia, PA 19104 and WILLIAM S. MARTIN (9th Div.) 4002 Reno Street Philadelphia, PA 19104 and MICHAEL C. McCLEARY (5th D.) 4321 Haverford Avenue Philadelphia, PA 19104 and CHARLES E. MYERS (7TH Div.) 667 Holly Mall Philadelphia, PA 19104 and HARRY L. ROBINSON, JR. (8th D) 764 N. 43rd Street Philadelphia, PA 19104 and DONITA B. ULMER (10th Div.) 835 North Brooklyn Street	CIVIL ACTION NO.

Philadelphia, PA 19104 :
and :
ESSIE M. WILLIAMS (5th Div.) :
616 North Brooklyn Street :
Philadelphia, PA. 19104 :
and :
ELSIE L. WISE (1st Div.) :
4061 Filbert Street :
Philadelphia, PA 19104 :
and :
MEE JIN YOUK (8TH Div) :
4248 Lancaster Avenue :
Philadelphia, PA 19104 :
Plaintiffs :
v. :
MICHAEL HORSEY :
612 Cristina Place :
Philadelphia, PA 19139 :
and :
ROBERT BRADY on behalf of :
PHILADELPHIA DEMOCRATIC :
COUNTY EXECUTIVE COMMITTEE, :
AN UNINCORPORATED ASSOCIATION :
1421 Walnut Street :
Philadelphia, PA 19102 :
Defendants :
:
.....:

INTRODUCTION

1. The jurisdiction of this Court is invoked under Section 1 of the 14th Amendment and the First Amendment to the United States Constitution, Title 28 U.S.C. 1331, federal question under the Federal Civil Rights Act Title 42 U.S.C. 1983, Title 28 U.S.C. 1343,

and pendent jurisdiction.

2. Plaintiffs JAMES BARBER, 802 North 40th Street, Philadelphia, PA 19104; FRED BRANDON, 1009 North 46th Street, Philadelphia, PA 19131; ALFONZO CAREY, 1020 North 46th Street, Philadelphia, PA 19131; BEATRICE DUNSTON, 4633 4061 Filbert Street, Philadelphia, PA. 19104; TIJUANA KNOX, 4061 Filbert Street, Philadelphia, PA 19104; WILLIAM S. MARTIN, 4002 Reno Street, Philadelphia, PA. 19104; MICHAEL C. McCLEARY, 4321 Haverford Avenue, Philadelphia, PA 19104. CHARLES E. MYERS, 667 Holly Mall, Philadelphia, PA. 19104; HARRY L. ROBINSON, JR., 764 N. 43rd Street, Philadelphia, PA 19104; DONITA B. ULMER, 835 North Brooklyn Street, Philadelphia, PA. 19104; ESSIE M. WILLIAMS, 616 North Brooklyn Street, Philadelphia, PA. 19104; ELSIE L. WISE, 4061 Filbert Street, Philadelphia, PA 19104; MEE JIN YOUK, 4248 Lancaster Avenue, Philadelphia, PA 19104, hereafter "Plaintiff

Committeepersons", are individuals who presently reside at the addresses listed above.

3. At all times hereinafter mentioned, the Defendant Michael Horsey, hereafter "Defendant Horsey", is the individual serving as the ward leader of the Democratic Executive Committee for the 6th Ward of the City of Philadelphia, hereafter the "Sixth Ward Democratic Committee", and who is believed to reside at 612 Cristina Place, Philadelphia, Pennsylvania 19139.

4. Defendant Philadelphia Democratic County Executive Committee, hereafter "Defendant Philadelphia City Committee", is an unincorporated political association comprised of the Democratic Ward Leaders chosen in each of the respective words of the City of Philadelphia whose principal place of business is 1421 Walnut Street, Philadelphia, Pa. 19102.

5. Defendant Robert Brady is an

individual whose principal place of business is 1421 Walnut Street, Philadelphia, PA 19102 and who currently serves as the chairman and chief officer and representative of the Defendant Philadelphia City Committee.

COUNT 1 ALL PLAINTIFFS v. DEFENDANT HORSEY ONLY VIOLATION OF 42 U.S.C. 1983-DAMAGES

6. At the primary election held on May 15, 1990, plaintiffs were all individuals elected to the position of Democratic Ward Executive Committee, hereafter "ward committeeperson", in the 6th Ward in the City of Philadelphia for the respective divisions shown in the above caption.

7. The Pennsylvania State Election Code, 25 P.S.§ 2837 adopts by reference the official rules of the Philadelphia Democratic County Executive Committee, hereafter "Democratic Party Rules", regarding the election of ward committeepersons and county committeepersons.

8. Rule III, Art. 1, Section B and Rule I Art. 1 of the Democratic Party Rules require that two persons are elected ward committeeperson for each respective voting division by the vote of a plurality of the Democratic voters at the primary election which was held on May 15, 1990.

9. The Democratic Party Rules, Rule III, Art. 1, Sec. A and Rule IV, Art. 1, Sec. A, also require that on the third Monday immediately following the election of the ward committeepersons, the elected ward committeepersons shall meet in each ward and elect a county committee member, hereafter referred to as "Democratic ward leader".

10. The Democratic Party Rules, Rule III, Art. 2, Sec. B-C and Rule V, Art. 1, Sec. F, and Rule V, Art. 2, Sec. E and Rule XI, Art. 1, mandate that the Democratic ward leader be elected by a plurality of the elected committeepersons in each ward who are actually present at the ward reorganization

meeting.

11. On or about June 4, 1990, the ward reorganization meeting for the Philadelphia 6th Ward Democratic Executive Committee was held at 8 P.M. at the Lincoln University Urban Campus at 4601 Market Street, Philadelphia.

12. At all times pertinent to this complaint, the Defendant Horsey claimed authority from the Pennsylvania Election Code and Democratic Party Rules to conduct elections for ward officers, and in doing the acts and things hereinafter set forth, said Defendant Horsey was acting in his capacity as a ward leader under color of state law.

13. At the 6th Ward Reorganization meeting, Defendant Horsey conducted the meeting in an improper fashion contrary to Democratic party rules and therefore, in violation of the Pennsylvania Election Code. In particular, Defendant Horsey refused to permit the elected plaintiffs and a plurality

of the elected committeepersons present to vote for ward officers.

14. Defendant Horsey proclaimed himself 6th Ward Democratic Ward Leader without a vote of the elected committeepersons present at the ward reorganization meeting. Defendant Horsey then appointed the other ward officers by "Royal Fiat" without an election in violation of Democratic Party rules and state law.

15. Plaintiffs were denied their voting rights to express their Free Speech political preference for ward officers guaranteed by the First Amendment to the U.S. Constitution. Plaintiffs and the voters they represent were totally denied the right to vote for a 6th ward leader and for other 6th ward officers of plaintiffs' choice on an equal basis with other elected committeepersons, in violation of Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

16. The voters represented by the plaintiff committeepersons were denied "One Person, One Vote" rights by the actions of Defendant Horsey,in violation of Equal Protection of the Law guaranteed by the Fourteenth Amendment to the U.S. Constitution.

17. If a fair and legal ward reorganization election had been conducted and the plaintiffs' votes been counted on June 4, 1990, Defendant Horsey would not have been chosen 6th Ward Democratic Ward leader nor would the other purported 6th Democratic ward officers have been chosen. Instead candidates whom the plaintiff committeepersons supported would have been elected instead. In particular, Plaintiff James Barber would have been elected Democratic Ward Leader of the 6th Ward.

18. The 6th Ward Democratic ward leader also acts under color of state law in that the ward leader serves as Democratic County

Committeeperson and in those roles as ward leader and county committeeperson has numerous official state functions including, inter alia, voting on the filling of vacancies for nomination for public office between primary and general elections, the adoption of Democratic Party Rules under the Election Code and the official endorsement of candidates for public office by the Democratic Party.

19. The Defendant Horsey has refused to recognize the plaintiffs as validly elected representatives of the Democratic voters of their respective divisions and has refused to give them notice of all ward meetings, refused to permit plaintiffs to vote or to participate at official Democratic ward meetings and functions of the 6th ward.

20. The actions of Defendant Horsey has caused and continues to cause the destruction of the Equal Rights of Free Speech and Free Assembly and One Person One Vote possessed by

the plaintiffs as guaranteed by the First and Fourteenth Amendments of the United States Constitution and applicable provisions of the Pennsylvania Constitution in that the acts of Defendant Horsey impeded and violated the Plaintiffs' ability to nominate and to vote for persons of their choice for public and political offices.

21. All plaintiffs were damaged in that they were deprived of their rights to elect a candidate of their choice as a ward leader and other ward officers.

22. Plaintiff James Barber and other plaintiffs were damaged in that they were deprived of their rights to be elected to the position of ward leader and other ward offices.

23. Plaintiffs are each entitled to damages in the amount of ten thousand dollars ($10,000.00) for their embarrassment, mental distress and the humiliation and violation of their First and Fourteenth Amendment Rights.

24. Plaintiff Barber is individually entitled to twenty thousand dollars ($20,000.00) damages for violation of his First and Fourteenth Amendment Rights to run for election for ward leader on an equal basis with all other candidates.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 2 - ALL PLAINTIFFS v. ALL DEFENDANTS
INJUNCTIVE RELIEF

25. Paragraphs 1 through 24 are incorporated herein by reference.

26. Plaintiffs filed an appeal of Defendant Horsey's claim to ward leadership with the Defendant Philadelphia City

Committee. Defendant Philadelphia City Committee held a hearing to certify the new 6th ward leader. In convening the hearing under party rules incorporated into state law, Defendant Philadelphia City Committee was acting under color of state law.

27. Based on evidence which Defendant Horsey knew to be false and fraudulent, Defendant Brady and Philadelphia City Committee were misled and accepted Defendant Horsey's claim to the position of 6th Ward Democratic Ward Leader.

28. In particular, Defendant Horsey knowingly misrepresented that certain individuals voted for him at the 6th ward reorganization meeting, when in fact the individuals either did not vote for Defendant Horsey or were not in fact present at the reorganization meeting. Party Rules require that only the votes of persons present at the reorganization meeting may be counted.

29. Defendant Philadelphia City

Committee has given Defendant Horsey notice of all City Committee meetings and Defendant City Committee recognizes Defendant Horsey as 6th Ward Democratic Ward Leader for all purposes to the exclusion of the rights, vote and actual choice of the 6th Ward Democratic Committeepersons.

30. The failure of Defendant Philadelphia City Committee to recognize the actual choice of the 6th ward committeepersons is a violation of the party rules incorporated in state law, 25 P.S. 2837, and constitutes a denial of Due Process and Equal Protection of the law. Defendant Horsey's status as Sixth Ward Leader is illegal and obtained by egregious fraud. Defendant Brady and Philadelphia City Committee should be enjoined from recognizing Defendant Horsey as ward leader or from providing him with voting rights or other rights and privileges as 6th Ward Democratic Ward Leader.

31. Plaintiffs are irreparably harmed in that their choice of 6th Ward Leader and other ward officers, which Plaintiffs elected after Defendant Horsey illegally adjourned the reorganization meeting, have not been recognized by the Defendant Democratic City Committee for the current term. The ability to exercise rights and privileges of ward offices exists only until the expiration of the current term of the ward offices.

32. Plaintiffs have no adequate remedy at law to reinstate the majority choice for ward officers of the 6th ward other than an injunction.

WHEREFORE, Plaintiffs request that the court issue an order: 1. enjoining Defendant Brady and Philadelphia Democratic City Committee, its officers and agents from counting the vote of Defendant Horsey as a county committeeperson on any matter on which the 6th Ward leader would cast a vote under Democratic Party Rules or otherwise under

state law, and from otherwise recognizing, Defendant Michael Horsey as 6th Ward Democratic Ward Leader, and from listing Defendant Michael Horsey on any official communication of the Democratic Party as 6th Ward Leader or County Committeeperson; 2. that James Barber be recognized for all purposes as the validly elected Sixth Ward Democratic Executive Committee County Committeeperson, i.e. 6th Ward Leader, and that Defendant Philadelphia City Committee, its officers, employees and agents grant all rights and privileges of such office for all purposes to James Barber on the same and equal basis as every other elected county committeeperson in Philadelphia; 3. That Defendant Horsey be enjoined from conducting any official meetings of the 6th Ward Democratic Executive Committee; 4. directing that all Plaintiffs be given notice of all official Sixth Ward Meetings and that the votes of Plaintiffs be counted according to

state election law and Democratic Party rules until the current term of Committeeperson expires; 5. grant such other relief as the court deems appropriate.

COUNT 3
ALL PLAINTIFFS v.
DEFENDANT HORSEY ONLY
ATTORNEY FEES AND COSTS

33. The actions of Defendant Horsey described in Count 1 and 2 above make him liable for attorney's fees and costs under the Attorney's Fees Civil Rights Act, 42 U.S.C. 1986.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 4
PLAINTIFFS v. DEFENDANT HORSEY ONLY
COMMON LAW FRAUD
PENDENT JURISDICTION

34. Paragraph 1 through 33 are incorporated herein by reference.

35. Defendant Horsey misrepresented: a) the number of persons present and voting at the June 4, 1990 ward reorganization meeting and whom they voted for, and b) that the meeting was conducted in accordance with Democratic Party rules and state law.

36. Defendant Horsey's misrepresentations were material and deliberate and intended to induce the reliance of Democratic City Committee.

37. Democratic City Committee reasonably relied on the misrepresentations of Defendant Horsey in its certification of Defendant Horsey as Democratic 6th Ward leader.

38. The Plaintiffs in turn relied on the actions of Democratic City Committee in Democratic City Committee's review of its

certification of Defendant Horsey as 6th Ward leader.

39. Plaintiffs were damaged by Defendant Horsey's fraud in that Plaintiffs lost their choice of 6th ward leader and ward officers.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 5
PLAINTIFFS v. DEFENDANT HORSEY
VIOLATION OF STATE STATUTE
PENDENT JURISDICTION

40. Counts 1,2 and 4 are incorporated herein by reference.

41. The Philadelphia Democratic Party Rules regarding the election of committeeperson and ward leaders are

incorporated into the state election code, 25 P.S. 2837.

42. The action of Defendant Horsey violate the Democratic Party Rules and therefore the Pennsylvanian State Election Code. WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 6
PLAINTIFFS v. DEFENDANT HORSEY
VIOLATION OF
PENNSYLVANIA CONSTITUTION
DENIAL OF EQUAL PROTECTION
PENDENT JURISDICTION

43. Paragraph 1 through 42 are incorporated herein by reference.

44. The actions of Defendant Horsey in failing to conduct a proper election for ward

leader, constitute a violation of Plaintiffs, Free Speech and Equal Protection Rights as guaranteed by Article 1, Sections 1,2,5,7 and 26 of the Pennsylvania State Constitution.

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

COUNT 7 - PUNITIVE DAMAGES
ALL PLAINTIFFS v.
DEFENDANT HORSEY ONLY

45. Paragraph 1 through 44 are incorporated herein by reference.

46. The actions of Defendant Horsey were intentional, malicious and in bad faith or recklessly indifferent to the rights of Plaintiffs, entitling Plaintiffs to punitive damages in the amount of fifty thousand

dollars ($50,000.00).

WHEREFORE, Plaintiffs request that the court find Defendant Horsey liable to Plaintiffs and to issue an order directing that Defendant Horsey pay to Plaintiffs an amount equal to compensatory and punitive damages, plus interest, attorney's fees and costs of the present action, plus such other relief as the court deems appropriate.

ROBERT J. MULLIGAN[s]
Robert J. Mulligan Esq.
Attorney for Plaintiffs Barber et al.
4800 Larchwood Ave.
Philadelphia, Pa. 19143-2027
Atty. ID # 18470
(215) 474-0744
S.A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBER, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
HORSEY, et al.	:	No. 91-CV-4265

MOTION TO DISMISS OF DEFENDANTS DEMOCRATIC COUNTY EXECUTIVE COMMITTEE OF PHILADELPHIA AND MICHAEL HORSEY

Comes Now Defendants Michael Horsey and Democratic County Executive Committee of Philadelphia (hereinafter "Moving Defendants"), by and through its attorneys, Stephen J. Springer, Esquire, and Isadore A. Shrager, Esquire, and moves this Honorable Court pursuant to Rule 12(b)(1) and (6) to dismiss Plaintiffs' Complaint for the reasons set forth in Moving Defendants' accompanying Memorandum of Law.

STEPHEN J. SPRINGER[s]
STEPHEN J. SPRINGER, ESQUIRE
LaBRUM AND DOAK
1700 Market Street - Suite - 700
Philadelphia, PA 19103

Atty. I.D. #13627
(215) 587-4311

ISADORE A. SHRAGER[s]
ISADORE A. SHRAGER, ESQUIRE
FOX, ROTHSCHILD, O' BRIEN &
FRANKEL
2400 Market Street - 10th Floor
Philadelphia, PA 19103
Atty. I.D. #03276
(215) 299-2022
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
MICHAEL HORSEY, et al.	:	NO. 91-4265

CERTIFICATE OF SERVICE

I do hereby certify that service of a true and correct copy of the within Defendants' Motion to Dismiss and supporting Memorandum of Law was made on August 9, 1991, to counsel named below by first class United States Mail, postage prepaid, to the following:

Robert J. Mulligan, Esquire
4800 Larchwood Avenue
Philadelphia, PA 19143-2027

LaBRUM AND DOAK

By: Stephen J. Springer[s]
Stephen J. Springer

DATE: August 8, 1991

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBER et. al.	:	CIVIL ACTION
	:	
	:	
HORSEY, et. al.	:	No. 91-CV-4265

STIPULATION

It is hereby Stipulated by and between Robert J. Mulligan, Esquire, counsel for Plaintiffs, and Stephen J. Springer, Esquire, co-counsel for Defendants, that the time for Defendants to move, respond or otherwise plead to Plaintiff's Complaint is extended until August 12, 1991 No prior requests for an extension has been made.

ROBERT J. MULLIGAN[s]
ROBERT J. MULLIGAN, ESQUIRE
4800 Larchwood Avenue
Philadelphia, PA. 19143-2027
Atty. ID. #18470
(215) 474-0744
Attorney for Plaintiffs

STEPHEN J. SPRINGER[s]
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ISADORE A. SHRAGER, ESQUIRE
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FRANKEL
2000 Market Street - 10th Floor
Philadelphia, PA 19103
Atty. I.D. #03276
(215) 299-2022
Attorneys for Defendants

EXTENSION GRANTED AS STIPULATED
MICHAEL E. KUNZ
CLERK
By:
Deputy Clerk
Date: 8-13-91

ENTERED: 8-14-91
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBER, et al.	:	CIVIL ACTION
v.	:	
HORSEY, et al.	:	NO. 91-CV-4265

ANSWER TO MOTION TO DISMISS

Plaintiffs James Barber et al. request that the court deny defendants motion to dismiss plaintiff's complaint under FRCP 12(b)(1) and (6) for the reasons set forth in plaintiff's accompanying memorandum.

ROBERT J. MULLIGAN JR
Robert J. Mulligan
Attorney for Plaintiffs
James Barber et al.
Attorney I.D. No.18470
4800 Larchwood Avenue
Philadelphia, PA 19143
(215)474-0744

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER ET AL.	:	
Plaintiff	:	
v.	:	No.91-CV-4265
MICHAEL HORSEY ET AL.	:	
Defendants	:	

CERTIFICATION OF SERVICE

I, ROBERT J. MULLIGAN ESQ., hereby certify that I have served copies of the PLAINTIFFS' ANSWER TO MOTION TO DISMISS WITH MEMORANDUM upon the defendants counsel in the above captioned matter, by mailing a copy by first class mail on DATE August 21, 1991, addressed to:

Stephen J. Springer Esq.
Labrum and Doak
1700 Market Street-Suite 700
Philadelphia, PA 19103
Attorney for Defendants

8/21/91
Date

Robert J. Mulligan
(215) 474-0744
Attorney I.D. #18470
Robert J. Mulligan, Esq.
4800 Larchwood Avenue
Philadelphia, PA 19143-2027
Attorney for Plaintiffs
James Barber et al.

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER, et at.	:	Civil Action
	:	
v.	:	
	:	
MICHAEL HORSEY, et at.	:	No. 91-4265

Newcomer, J. November 27, 1991

M E M O R A N D U M

Plaintiffs bring this civil rights action claiming that defendants, in violation of 42 U.S.C. § 1983, violated plaintiffs' constitutional rights while acting under color of state law. Presently before the court is defendants' motion to dismiss pursuant to Fed. R. Civ. P, 12(b) (6).

I. Factual Background.

Defendant Horsey is the Ward Leader of the Democratic Party Executive Committee for the Sixth Ward in the City of Philadelphia. Defendant Philadelphia Democratic County Executive Committee ("City Committee") is an unincorporated political association.

The City Committee is comprised of Democratic Ward Leaders representing the various wards of Philadelphia.

On May 15, 1990, a Democratic primary election was held. Plaintiffs were elected as Ward Committeepersons for the Sixth Ward in Philadelphia. On June 4, 1990, a meeting of the Sixth Ward Executive Committee was held. At this meeting, defendants Horsey conducted an election for ward officers. According to plaintiffs' Complaint, defendant Horsey, in violation of Democratic party rules and the Pennsylvania Election Code, refused to permit many of the committeepersons, including the plaintiffs, to vote for ward officers. The Complaint alleges that defendant Horsey declared himself Ward Leader of the Sixth Ward and appointed ward officers without an election.

Plaintiffs filed an appeal with defendant City Committee, which after a hearing, accepted defendant Horsey as Ward

Leader of the Sixth Ward. Plaintiffs allege that the City Committee's recognition of defendant Horsey as Ward leader was in violation of the rules of the City Committee and Pennsylvania State law.

II. Rule 12(b)(6) Standard.

Pursuant to Fed. R. Civ. P. 12(b)(6), a court should dismiss a case for failure to state a cause of action only if it appears to a certainty that no relief could be granted under any set of facts which could be proved. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Because granting such a motion results in a determination on the merits at such an early stage of a plaintiff's case, the district court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Derby Township, 838 F.2d

663, 664-65 (3d Cir. 1988) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)).

III. Discussion

In order for plaintiffs' claim to survive the motion to dismiss this court must find that plaintiffs may be entitled to relief under the United States Constitution and/or 42 U.S.C. § 1983, otherwise this court will have no jurisdiction to decide plaintiffs' case. 28 U.S.C. § 1331. The primary determinative issue in this case is whether defendants were acting as state actors under color of state law when they committed the acts forming the basis of plaintiffs' Complaint.

Plaintiffs assert that Bentman v. Seventh Ward Democratic Executive Committee 421 Pa. 188, 218 A.2d 261 (1966), is dispositive of this issue. In Bentman, the Pennsylvania Supreme Court held that the internal affairs of a political party are of

such concern to the public as to subject these affairs to the restraints placed on state actors by the United States Constitution. Id. Plaintiffs claim that under the doctrine developed in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), which holds that state court interpretations of state law are binding on federal courts sitting in diversity, this court is bound by the Pennsylvania Supreme Court's opinion in Bentman.

Plaintiffs' argument is flawed in one major regard. This court is not sitting in diversity adjudicating a state law claim. Plaintiffs' claim is before this court under this court's federal question jurisdiction. See 28 U.S.C. § 1331. In matters of federal law, only precedent established by the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States is controlling.

In Lynch v. Torquato, [1] the Third Circuit held that "the normal role of party leaders in conducting internal affairs of their party... does not make their party offices governmental offices or the filling of these offices state action." Ten years later, in McMenamin v. Philadelphia County Democratic Executive Committee,[2] then District Court Judge Higginbotham, applied the Third Circuit's reasoning in Lynch to a case which was nearly identical to the instant case. In McMenamin, the plaintiff instituted a civil rights action against the defendants alleging that defendants unconstitutionally deprived her of the position of Ward Leader of the forty-second ward of Philadelphia. Defendants were accused of denying plaintiff and others the right to vote for Ward Leader and of

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[1]/ 343 F.2d 370 (3d Cir. 1965).

[2] 405 F. Supp. 998 (E.D. Pa 1975).

improperly recognizing the incumbent Ward Leader. Citing Lynch, Judge Higginbotham concluded that the internal affairs of a political party, specifically the filling of a party office, is not state action, nor does it constitute action under color of state law. McMenamin, 405 F. Supp. at 1003-04. See also Banchy v. Republican Party of Hamilton County, 898 F.2d 1192, 1196 (6th Cir. 1990), citing Lynch and McMenamin.

This court adopts the reasoning of the McMenamin decisions and concludes that the alleged actions of defendants in the instant case (which are virtually identical to the actions of the defendants in McMenamin) do not constitute state action. Accordingly, as plaintiffs have alleged no federal claim upon which relief can be granted, plaintiffs' action will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

IV. Conclusion.

This court in no way intends to sanction the type of abuse of political party rules and policies that plaintiffs here allege. Conduct of the sort alleged is an outrage, and plaintiffs' desire for redress is understandable. Plaintiffs, however, have chosen the wrong cause of action in the wrong forum to seek redress. Under the federal law as it currently stands, defendants' alleged wrongdoing does not constitute a breach of any federal statutory or constitutional right of plaintiffs.

An appropriate Order follows.

Clarence C. Newcomer [s]

Clarence C. Newcomer,

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER, et al.	:	Civil Action
v.	:	
MICHAEL HORSEY, et al.	:	No. 91-4265

O R D E R

AND NOW this 27th day of November, 1991, after consideration of defendants' Motion to Dismiss, and plaintiffs' response thereto, consistent with the foregoing memorandum opinion, it is hereby ORDERED that defendants motion is GRANTED and plaintiffs' action is DISMISSED with prejudice.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER et al.	:	
Plaintiffs	:	Civil Action
	:	
v.	:	No.91-cv-4265
	:	
MICHAEL HORSEY et al.	:	(Newcomer)
Defendants	:	

NOTICE OF APPEAL

BY PLAINTIFFS JAMES BARBER, FRED BRANDON, ALFONZO CAREY, BEATRICE DUNSTON, TIJUANA KNOX, WILLIAM S. MARTIN, MICHAEL C. MCCLEARY, CHARLES E MYERS, HARRY L ROBINSON, JR., DONITA B.ULMER, ESSIE M. WILLIAMS, ELSIE L. WISE, MEE JIN YOUK

DATE: DECEMBER 27, 1991

Notice is hereby given that Plaintiffs James Barber, Fred Brandon, Alfonzo Carey, Beatrice Dunston, Tijuana Knox, William S. Martin, Michael C. MCCleary, Charles E. Myers, Harry L. Robinson, JR., Donita B. Ulmer, Essie M. Williams, Elsie L. Wise, Mee Jin Youk hereby appeal to the United States Court of Appeals for the Third Circuit from the final order of U.S. District Judge Clarence Newcomer of the U.S. District Court for the Eastern District of Pennsylvania entered in this action on December 4, 1991 dismissing plaintiffs' action.

December 27, 1991
Date

ROBERT J. MULLIGAN [s]
Attorney I.D. #18470
Robert J. Mulligan, Esq.
4800 Larchwood Avenue

Philadelphia, PA 19143-2027
Attorney for Appellants/Plaintiffs
James Barber et al.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BARBER et al. Plaintiffs	:	Civil Action
v.	:	No.91-cv-4265
MICHAEL HORSEY et al. Defendants	:	(Newcomer)

CERTIFICATION OF SERVICE

I, ROBERT J. MULLIGAN ESQ., hereby certify that I have served copies of the Plaintiffs NOTICE OF APPEAL upon the defendants counsel in the above captioned matter, by mailing a copy by first class mail on DECEMBER 27, 1991, addressed to:

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Date 12/27/92
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Attorney for Appellants/Plaintiffs
James Barber et al.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2104

JAMES Barber (9th Div.), FRED BRANDON (18th Div.), ALFONZO CAREY (18th Div .), BEATRICE DUNSTON (16th Div.), TIJUANA KNOX (1st Div.), WILLIAM S. MARTIN (9th Div.), MICHAEL C. McLEARY (5th Div.), CHARLES E. MYERS (7th Div.), HARRY L. ROBINSON, JR. (8th Div.), DONITA B. ULMER (10th Div.), ESSIE M. WILLIAMS (5th Div.), ELSIE L. WISE (1st Div.), MEE JIN YOUK (8th Div.),
Appellants

V.

MICHAEL HORSEY, ROBERT BRADY, on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE, An Unincorporated Association,
Appellees

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-04265)

District Judge:
Honorable Clarence C. Newcomer

Submitted Under Third Circuit Rule 12(6)
June 23, 1992

PRESENT: HUTCHINSON, COWEN and ALITO,
Circuit Judges

JUDGEMENT

This cause came to be heard on record from the United States district Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on June 23, 1992.

On consideration whereof, it is now here ordered and adjudged by this court that the order to the district court entered December 3, 1991, be and the same is hereby affirmed.

Costs shall be taxed against appellants.

ATTEST:

Sally Mrvos [s]
Clerk

DATED: July 17, 1992

[stamped]
Certified as a true copy and issued in lieu of a formal mandate on September 8, 1992

Test: Signature [s]

Acting Chief Deputy Clerk, United states Court of Appeals for the Third Circuit

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2104

JAMES Barber (9th Div.), FRED BRANDON (18th Div.), ALFONZO CAREY (18th Div .), BEATRICE DUNSTON (16th Div.), TIJUANA KNOX (1st Div.), WILLIAM S. MARTIN (9th Div.), MICHAEL C. McLEARY (5th Div.), CHARLES E. MYERS (7th DiV.), HARRY L. ROBINSON, JR. (8th Div.), DONITA B. ULMER (10th Div.), ESSIE M. WILLIAMS (5th Div.), ELSIE L. WISE (1st Div. , MEE JIN YOUK (8th Div.),
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V.

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Appeal from the United States District Court
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(D.C. Civil Action No. 91-04265)

District Judge:
Honorable Clarence C. Newcomer

Submitted Under Third Circuit Rule 12(6)
June 23, 1992
Filed: July 17, 1992

PRESENT: HUTCHINSON, COWEN and ALITO,

Circuit Judges

MEMORANDUM OPINION OF THE COURT

HUTCHINSON, Circuit Judge

James Barber (Barber) and the other appellants [1] are committee persons of the Democratic Party for the Sixth Ward of the City of Philadelphia. They appeal an order of the United States District Court for the Eastern District of Pennsylvania dismissing their complaint for a failure to state a claim pursuant to Federal Rule of Civil Procedure 12 (b) (6).

Barber alleges that Michael Horsey (Horsey) and Robert Brady, on behalf of the Philadelphia Democratic County Executive Committee (collectively "Democratic City Committee"), acted under color of state law

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[1]/ The other appellants are Fred Brandon, Alfonzo Carey Beatrice Dungeon, Tijuana Knox, William S. Martin, Michael C. McCleary, Charles E. Myers, Harry L. Robinson, Jr., Donita h. Ulmer, Elsie M. William, Elsie L. Wis and Mee Jin Youk.

in denying Barber and the other appellants the right to vote to replace Horsey as Democratic Ward Leader for the Sixth Ward in the City of Philadelphia. In their complaints Barber and the other appellants assert that Horsey refused to count their votes for ward leader at a ward reorganization meeting called in accord with party rules, even though Barber -and his allies had been elected Democratic committee persons in the preceding primary. They allege that Horsey's course of conduct was an action taken under color of state law because the Pennsylvania Election Code, 25 Pa. Cons. Stat. Ann. § 2837 (1963) incorporates the rules of the major political parties into state law. Therefore, Barber claims that Horsey's refusal to permit Barber and the committee persons allied with him an opportunity to vote, along with the Democratic City Committee's rejection of Barbers protest against Horsey's election as

ward leader, violated 42 U.S.C.A. § 1983 (West 1981).

The district court had subject matter jurisdiction over Barber's claims pursuant to 28 U.S.C.A. §§ 1331 (West Supp. 1992) and 1343(a) (West Supp. 1992). We have appellate jurisdiction over Barber's appeal pursuant to 28 U.S.C.A. § 1291 (West Supp. 1992).

The facts, as stated by the district court in its opinion granting Horsey's Rule 12(b)(6) motion to dismiss, are as follows: Horsey is the Ward Leader of the Democratic City Committee for the Sixth Ward in Philadelphia. The Democratic City Committee is an unincorporated political association and is comprised of Democratic Ward Leaders representing the various wards of Philadelphia.

On May 15, 1990, a Democratic primary election was held. Barber and the other appellants were elected as ward committee persons for the Sixth Ward of Philadelphia.

On June 4, 1990, a meeting of the Sixth Ward Executive Committee was held where Horsey conducted an election for ward officers. According to Barber's complaint, Horsey, in violation of Democratic party rules and the Pennsylvania Election Code, refused to permit many of the committee persons, including Barber and the other appellants, to vote for ward officers. The complaint alleges that Horsey declared himself Ward Leader of the Sixth Ward and appointed ward officers without an election.

Barber filed an appeal with the Democratic City Committee which, after a hearing, accepted Horsey as Ward Leader of the Sixth Ward. Barber alleges that the Democratic City Committee's recognition of Horsey as Ward Leader was in violation of the rules of the Democratic City Committee and Pennsylvania state law.

The decision of this Court in Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1968) holding

that "the normal role of party leaders in conducting internal affairs of their party... does not make their party offices governmental offices or the filling or these offices state action," id. at 372, controls this case. It is, of course, binding on this panel under Third Circuit Internal operating Procedure 91. See also McMenamin v. Philadelphia County Democratic Executive Committee, 405 F. Supp. 998, 1003-04 (E.D. Pa. 197) (Higginbotham, J,) (denying relief to plaintiff McMenamin in a civil rights action alleging party leaders deprived her of the position of ward leader in the 42nd Ward of Philadelphia because filling of a party office is not state action and does not constitute action under color of state law). While we did exempt "primary and general elections" from our holding in Lynch, that reference was to those elections in which the general populace votes and not to elections which decide the internal organization of a

political party, like the one in this case.

Barber asks us to follow the Supreme Court of Pennsylvania's decision in Bentman v. Seventh Ward Democratic Exec. Comm., 218 A.2d 261 (Pa. 1965). In Bentman, the court held a party committee's refusal to recognize membership on party committees "to persons who have been lawfully elected to such membership by a majority of the qualified party electors" qualifies as a state action under the Fourteenth Amendment to the United States Constitution. See id. at 269. This conflicts with our holding in Lynch.

It is unfortunate that there is a conflict between the decisions of the highest court of the Commonwealth of Pennsylvania and the decisions of this Court concerning federal civil rights law. Nevertheless, this panel is controlled by the decisions of this Court concerning federal law and not by differing interpretations advanced by state courts. Now Circuit Judge Higginbotham said

in McMenamin:

> If I were bound to anticipate how the Pennsylvania Supreme Court would construe this issue as a matter of federal constitutional law, I would be inclined to hold that under the rationale suggested in Bentman, plaintiff's complaint should not be dismissed. However, I am bound by the ruling of the Court of Appeals of this Circuit and, because of Lynch, I cannot justify this court's intervention in the election of a ward leader when trial judges have been advised that a federal court should not even intervene in the election of a party's county chairman.

McMenamin, 405 F. SUPP. at 1003. Erie is not applicable to the interpretation of federal law.

Like the district court, we do not mean to condone or approve the conduct of party affairs in the manner in which Barber alleges they were conducted in this case. We are, however, unable to grant relief under controlling case law. As the district court stated, appellants have chosen the wrong forum to seek redress for the failure of Horsey and the Democratic City Committee to

afford them the right, as duly elected committee persons, to vote for the ward leader of their choice. The proper forum for the appellants is the Pennsylvania state courts.

TO THE CLERK:
Please file the foregoing memorandum opinion.

William D. Hutchinson [s]
Circuit Judge

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JAMES BARBER, et al. Petitioners, Appellants	: CIVIL APPEAL
v.	: Appeal Docket : No. 91-2104
MICHAEL HORSEY, et al. (Hutchinson) Appellees	:

APPELLANTS' MOTION TO EXTEND TIME TO FILE EN BANC REHEARING REQUEST UNDER F.R.A.P. 40(a), 27(b) and (c), and 26(b)

1. Petitioners are JAMES BARBER ET AL., appellants in the above captioned appeal.

2. Respondents are Michael Horsey et al, appellees in the above captioned appeal.

3. On June 23, 1992, the above matter was referred to a three judge appeal panel on the briefs alone pursuant to Third Circuit Local Rule 12(6).

4. The decision was filed by the panel on Friday, July 17, 1992 denying the appeal.

5. The memorandum opinion was received by the office of Robert J. Mulligan Esq., attorney for appellants on Tuesday, July 21, 1992.

6. Attorney Robert J. Mulligan was outside of the United States on vacation for the period commencing July 18, 1992 until August 3, 1992.

RECEIVED AND FILED
8-3-92
SALLY MRVOS
[s]
Clerk

ORDER
Motion GRANTED
Sally Mrvos

CLERK
AUG 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2104

JAMES BARBER (9th Div.), FRED BRANDON (18th Div.), ALFONZO CAREY (18th Div.), BEATRICE DUNSTON (16th Div.), TIJUANA KNOX (1st. Div.), WILLIAM S. MARTIN (9th Div.), MICHAEL C. McCLEARY (5th Div.), CHARLES E. MYERS (7th Div.), HARRY L. ROBINSON, JR. (8th Div.), DONITA B. ULMER (10th Div.), Essie M. William (5th Div.), ELSIE L. WISE (1st Div.), MEE JIN YOUK (8th Div.),
Appellants

v.

MICHAEL HORSEY, ROBERT BRADY on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE, An Unincorporated Association,
Appellees

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-04265)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON,

SCIRICA, COWEN, NYGAARD,
ALITO, and ROTH, Circuit Judges

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the court,

William D. Hutchinson
Circuit Judge

DATED: AUG 31, 1992

Supreme Court, U.S.
FILED
DEC 31 1992
OFFICE OF THE CLERK

No. 92-1040

(3)

IN THE SUPREME COURT OF THE UNITED STATES

JAMES BARBER (9th Div.), FRED BRANDON (18th Div.), ALFONZO CAREY (18th Div.), BEATRICE DUNSTON (16th Div.), TIJUANA KNOX (1st Div.), WILLIAM S. MARTIN (9th Div.), MICHAEL C. McCLEARY (5th Div.), CHARLES E. MYERS (7th Div.), HARRY L. ROBINSON, JR. (8th Div.), DONITA B. ULMER (10th Div.), ESSIE M. WILLIAMS (5th Div.), ELSIE L. WIS (1st Div.), MEE JIN YOUK (8th Div.),

Petitioners,

v.

MICHAEL HORSEY, ROBERT BRADY, on behalf of PHILADELPHIA DEMOCRATIC COUNTY EXECUTIVE COMMITTEE, An Unincorporated Association,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: December 31, 1992

32 pp

QUESTIONS PRESENTED FOR REVIEW

The core questions to which the Petition for Writ of Certiorari in this case addresses itself are more accurately stated as follows:

1. Does the political question doctrine as articulated in O'Brien v. Brown apply to make the instant internal political party dispute nonjusticiable?

2. Assuming *arguendo* that federal courts could intervene into the internal affairs of political parties, does the conduct of a local ward leader in a ward leadership election constitute state or governmental action for purposes of the First and Fourteenth Amendments or Section 1983 of the Federal Civil Rights Act?

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STATUTES INVOLVED IN THE CASE

The sole statute, the interpretation of which is implicated in this Petition, is codified at 42 U.S.C. §1983 and provided, in full text, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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No. 92-1040

IN THE
SUPREME COURT OF THE UNITED STATES

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

A. Statement of Procedural History.

Petitioners, James Barber, Fred Brandon, Alfonzo Z. Carey, Beatrice Dunston, William S. Martin, Michael C. McCleary, Charles E. Myers, Harry L. Robinson, Jr., Donita B. Ulmer, Essie M. Williams, Elsie L. Wils, and Mee Jin Youk, filed their Complaint on July 3, 1991. In their Complaint, the Petitioners claimed a violation of the First and Fourteenth Amendments of the United States Constitution and of the Federal Civil Rights Act codified at 42 U.S.C. § 1983 (West 1981).

Respondents Michael Horsey and Robert Brady on behalf of the Democratic County Executive Committee of Philadelphia moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), arguing that the predicate conduct in the election for ward officers did not constitute "state action" within the meaning of Section 1983. On August 21, 1991, Petitioners filed their Opposition to the Motion to Dismiss, asserting that a decision of the Pennsylvania Supreme Court controlled the determination of this federal question. A Reply Brief and Sur-Reply followed.

By Order dated November 27, 1991, the District Court (Newcomer, J.) granted the Motion to Dismiss the action. In an unpublished opinion, the District Court explained that "the normal rule of party leaders in conducting internal affairs of their party ... does not make their party officers governmental offices or the filling of these offices state action."

On appeal, the United States Court of

Appeals for the Third Circuit affirmed the Order of Dismissal. Relying on Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965), the Third Circuit determined that federal law must be applied when deciding what constitutes "under color of state law" for purposes of Section 1983 and thereunder held that the Respondents herein did not act "under color of state law" when fulfilling their duties relating to an intra-party ward leader election. Petitioners then moved for a rehearing of the Order of the Panel dated July 16, 1992. On August 31, 1992, the Sur-Petition for Rehearing was denied and this Petition for a Writ of Certiorari ensued.

B. Counterstatement of Facts.

The pertinent facts hereunder are gleaned from the specific well-plead factual allegations in Petitioners' Complaint. This lawsuit arose out of a ward leadership dispute in the Sixth Ward of the Democratic Party in Philadelphia. Respondent Michael Horsey

currently is Democratic ward leader of the Sixth Ward. App. at R. 12. Petitioners are Democratic Party committeepersons within the Sixth Ward who were unsuccessful in wresting control of the Sixth Ward from Horsey. App. at R. 13.

On May 15, 1990, a Democratic primary election was held wherein Petitioners were elected ward committeepersons for the Sixth Ward in Philadelphia. App. at R. 13. On June 4, 1990, the Sixth Ward Executive Committee convened at a meeting wherein Respondent Horsey conducted an election for ward officers. App. at R. 15.

In their Complaint, Petitioners alleged that Respondent Horsey refused to permit the majority of the elected committeepersons, including Petitioners, to vote for ward officers in violation of Democratic Party Rules and the Pennsylvania Election Code. The Complaint further alleged that Horsey declared himself ward leader of the Sixth Democratic Ward without

a vote and appointed other ward officers by "fiat" in violation of the Democratic Party Rules and Regulations. App. at R. 15-16.

Petitioners filed an appeal with the Democratic Party County Executive Committee regarding Horsey's claim to ward leadership. App. at R. 20. After a hearing, the Executive Committee accepted Respondent Horsey as ward leader of the Sixth Ward. App. at R. 22.

Nonetheless, Petitioners commenced the instant lawsuit, alleging that Respondent Horsey's conduct was action taken under color of state law because the Pennsylvania Election Code, 25 Pa. Cons. Stat. § 2837 (1963), incorporates the rules of the major political parties into state law and as such effected a deprivation of due process and a violation of Section 1983 allegedly by reason of state action. App. at R. 20.

LEGAL ARGUMENT

REASONS FOR DENYING THE WRIT

Petitioners appear to offer two reasons in support of their request that this Court issue a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit in this case. The first is that in holding Respondents not to have acted under color of state law during an intra-party election for ward leadership, the Circuit Court either misapplied the reasoning of the Pennsylvania Supreme Court in Bentman v. The Seventh Ward Democratic Executive Committee, 421 Pa. 1988, 218 A.2d 261 (1966), or decided an important and unsettled question of federal law which warrants review by this Court. The second reason is that even if federal law governed, the Circuit Court erred in that it failed to adhere to numerous United States Supreme Court precedents, such as Nixon v. Herndon, 273 U.S. 536 (1927) and United States v. Classic, 313 U.S. 299 (1940), among others.

Respondents respectfully submit that neither of these proffered reasons provides adequate ground for the issuance of *certiorari* in this case. Indeed, Respondents submit that *certiorari* should be denied because this intra-party dispute is nonjusticiable as violative of the political question doctrine, and that even if justiciable, the alleged wrongful conduct of a local ward leader does not constitute state or governmental action under the First and Fourteenth Amendments of the United States Constitution or under Section 1983 of the Federal Civil Rights Act.

Finally, denial of the Writ is in no way obviated by cases such as Nixon v. Herndon, supra, or United States v. Classic, supra. Those cases, unlike the present action, involved claims of unconstitutional racial or geographic discrimination in the electoral process and therefore have no application to the case at bar. Conversely, this case, like Lynch v. Torquato, supra, involves an intra-party

political dispute without invidious racial or geographic discrimination.

1. The Instant Intra-Party Political Dispute Is Non-Justiciable Under The Political Question Doctrine.

It is a fundamental tenet of American jurisprudence that federal courts are not forums for the resolution of political disputes. Marbury v. Madison, 5 U.S. 137 (1 Cranch 1803). Indeed, the Court has decided as a matter of law that intra-party disputes constitute nonjusticiable political questions. O'Brien v. Brown, 409 U.S. 1 (1972).[1] Citing Lynch v. Torquato, 343 F.2d 370, the same case relied upon by the Third Circuit in affirming dismissal of Petitioners' Complaint in this case, the Court in O'Brien reasoned that federal courts may not undertake to interject themselves into the deliberative processes of political parties

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[1] In so holding, O'Brien altogether eliminates the need to engage in the five-part justiciability analysis otherwise required under Baker v. Carr, 369 U.S. 186 (1962).

because the issues presented would involve "relationships of great delicacy that are essentially political in nature." 409 U.S. at 5.

Similarly, the Court refused to permit any judicial intervention into the internal processes of political parties in Cousins v. Wigoda, 419 U.S. 477 (1975). There, certain delegates who were elected in a state primary election obtained a state court injunction precluding members of the Democratic Party from acting as delegates at the 1972 Democratic National Convention. The state court justified issuing the injunction on the ground that Illinois had a compelling interest in protecting the integrity of its electoral processes and the right of its citizens to effective suffrage. Notwithstanding the injunction, the Credentials Committee sat the disputed delegates at the National Convention on the ground that the elected delegates had been chosen in contravention of party guidelines. The Court

reversed the order granting an injunction, reasoning that the "convention itself [was] the proper forum for determining intra-party disputes as to which delegates [should] be seated." 419 U.S. at 491.[2]

The instant matter presents the classic nonjusticiable intra-party dispute. Petitioners contend that the election for ward leader held at the meeting of June 4, 1990 should be without legal force. Respondents assert, and the Democratic Executive Committee agreed, that the subject election results were valid.

As O'Brien and Cousins teach, the political party itself establishes the forum for the resolution of such internal party disputes. Here, the Democratic Executive Committee was that forum. It duly heard and rejected

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[2] The Court's continued adherence to the political question doctrine can be gleaned from its extension of the doctrine in Eu v. San Francisco Democratic Comm., 49 U.S. 214 (1989), to include state legislatures as other governmental bodies which are barred from dictating rules restricting or otherwise regulating the internal affairs of political parties.

Petitioners' claims. The decision of the Executive Committee is binding and federal courts may not substitute their decision for that of the proper forum or otherwise interfere in such intra-party political disputes.

In an apparent effort to escape this straightforward application of the controlling law, Petitioners discuss the importance of voting rights and decry the purported unstatesmanship of Respondents. Brief at 17-21. O'Brien does teach that voting rights are important for the internal management of political parties. 409 U.S. at 3. However, O'Brien also instructs that such rights do not outweigh the competing and compelling interest of political parties and their members in protecting the integrity of their internal affairs. Id. Additionally, Respondents submit that if the denial of voting rights at the national convention level were not sufficiently important to warrant an exception to the political question doctrine, see Cousins v.

Wigoda, supra, Petitioners' request for such exception at the local ward level is even less persuasive. Because the political question doctrine governs to render the instant matter nonjusticiable and Petitioners present no compelling reason for the nonapplication of the doctrine here, the Writ should be denied.

2. Even if the Instant Intra-Party Dispute Were Justiciable, the Predicate Conduct of a Local Ward Leader Does Not Constitute State or Governmental Action and Therefore the Complaint was Properly Dismissed.

Petitioners assert that the issue before the Court if *certiorari* were granted would be one of interpretation of state law incorporated into federal statute. Specifically, Petitioners maintain that the Pennsylvania Supreme Court's interpretation of "under color of state law" in Bentman v. Seventh Ward Democratic Executive Comm., 421 Pa. 188, 218 A.2d 261 (1966), should apply when deciding whether or not Respondents acted under color of state law during the election for Democratic

Party Ward Leader forming the basis of the instant lawsuit. Petition at ii. Contrary to Petitioners' assertion, this case, if at all justiciable, involves a pure question of federal law.

Wilson v. Garcia, 471 U.S. 261 (1985), an opinion of the Court which Petitioners insist[3] must be considered for a correct determination of the matter *sub judice*, is indeed dispositive of the general issue regarding whether federal or state law applies to claims arising under Section 1983 of the Federal Civil Rights Act.

In Garcia, the Court squarely held that federal law applies when deciding civil rights cases, notwithstanding state law to the contrary. Id. at 268. The Court there was faced with a situation not unlike here where a circuit court had decided a Section 1983 issue in a way which conflicted with a decision of a state's court of last resort. The Court of

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[3] Petition at 30-34.

Appeals in Garcia relied on federal law when deciding on the appropriate statute of limitations to apply in connection with a Section 1983 claim. In so doing, the Court of Appeals expressly refused to follow the decision of the New Mexico Supreme Court in DeVargas v. New Mexico, 97 N.M. 563, 564, 642 P.2d 166, 167 (1982), which applied a different (shorter) statute of limitations.

Finding the reasoning of the Court of Appeals' opinion "persuasive," this Court affirmed. 471 U.S. at 266. The Court discussed how civil rights claims under Section 1983 are governed by federal law thus:

> Our identification of the correct source of law properly begins with the text of § 1988 Congress' first instruction in the statute is that the law to be applied in adjudicating civil rights claims shall be in "conformity with the laws of the United States, so far as such laws are suitable." This mandate implies that resort to state law -- the second step in the process --

should not be undertaken before principles of federal law are exhausted. The characterization of § 1983 for statute of limitation purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course, are matters of federal law. Since federal law is available to decide the question, the language of § 1988 directs that the matter of characterization should be treated as a federal question. Only the length of limitations period and closely related questions of totalling an application, are to be governed by state law. (emphasis added).

* * *

State law shall only apply "so far as the same is not inconsistent with federal law." This requirement emphasizes "the predominance of the federal interest" in the borrowing process, taken as a whole.

* * *

Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing

> the essential elements of a federal cause of action.
>
> In borrowing statutes of limitations for other federal claims, this Court has generally recognized that the problem of characterization is ultimately a question of federal law.
>
> * * *
>
> The Court of Appeals was, therefore, correct in concluding that it was not bound by the New Mexico Supreme Court's holding in De Vargas.

471 U.S. 268-271.

The Court continued and further remarked that:

> The weight of federal authority is consistent with this view. (citations omitted). To the extent that federal courts have, on occasion, deferred to a state's characterization of a § 1983 for statute of limitation purposes, they have done so as a matter of

> deference or comity -- not obligation. [4]

471 U.S. at 270 n. 22.

Where, as here, the federal courts have been presented with cases involving political party disputes, they uniformly have applied federal law and have found no state action or no action under color of state law. See Banchy v. Republican Party of Hamilton County, 898 F.2d 1192 (6th Cir. 1990) (ward committeepersons' complaint that they were denied rights to participate in the election of their ward chairman held not to constitute a violation of Section 1983); Lynch v. Torquato, 343 F.2d 370, 372 (3d Cir. 1965) ("the normal rule of party leaders in conducting internal affairs of their party, other than primary or general elections, does not make their party offices governmental offices or the filling of

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[4] Petitioners suggest that the "borrowing" of the statute of limitations in Garcia is to be equated with the incorporation of state law interpretation into federal law. Petitioners misconceive the holding of Garcia. Garcia holds that "the law to be applied in adjudicating civil rights claims shall be in 'conformity with the laws of the United States'." 471 U.S. at 268.

these offices state action"); California Republican Party v. Mercier, 652 F. Supp. 928, 934 (C.D. Cal. 1986) (no state action involved in mailing of allegedly deceptive contained material in connection with the state party primary election); Jackson v. Michigan State Democratic Party, 593 F. Supp. 1033, 1045-6 (E.D. Mich. 1984) (held as a matter of law that plaintiffs had failed to state a claim under Section 1983 against the Michigan State Democratic Party where the basis of their action was a state statute which had nothing to do with the challenge to the selection of delegates to a political caucus); McMenamin v. Philadelphia County Democratic Executive Comm., 405 F. Supp. 988, 1003 (E.D. Pa. 1975) (held that the filling of a political party office is not state action or action under color of state law).

The great weight of persuasive authority notwithstanding, Petitioners assert that Bentman v. Seventh Ward Democratic Executive Committee, 421 Pa. 188, a decision of

the Pennsylvania Supreme Court interpreting the meaning of "under color of state law," governs the question at hand. In Bentman, the Pennsylvania Supreme Court held, without citation to any federal authority, that the internal affairs of a political party are of such concern to the public as to subject these affairs to the restraints placed on state actors by the United States Constitution. Id. In reaching its decision, the Bentman Court thus cavalierly disregarded principles of federal law, the predominance of the federal interest with regard to this issue, and the abundance of federal caselaw, including Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965).

Contrary to Petitioners' assertion, Garcia clearly applies[5] and requires that federal law, not state law, govern the question of whether or not a given conduct is "under color of state law" within the meaning of

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[5] Consequently, the lower courts in this case correctly applied the controlling federal law, not Bentman, in dismissing Petitioners' suit.

Section 1983. *A fortiori*, the Pennsylvania Supreme Court's decision in Bentman v. Seventh Ward Democratic Executive Comm., supra, is not controlling on the point and any apparent conflict between Bentman and the legion of federal court decisions applying federal law does not warrant review by this Court.

Petitioners persist and assert, albeit erroneously, that the Pennsylvania Supreme Court's opinion in Bentman was binding on the lower courts under the doctrine announced in Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938). One reading of Erie shows Petitioners' reliance thereon to be misplaced.

As the Court directed in Erie, federal courts generally are to apply substantive state law "[e]xcept on matters governed by the Federal Constitution or by Acts of Congress." 304 U.S. at 78. Plainly, by Erie's own language, the interpretation of the United States Constitution and Acts of Congress like Section 1983 of the Federal Civil Rights Act is a matter of federal

law only. Lynch and the long line of federal cases to the same effect interpreting "under color of state law" govern this dispute to ensure that the internal management of a political party does not become a justiciable controversy under Section 1983. The above analysis demonstrates that the application of Erie in no way changes the outcome of the case. The lower courts thus properly accorded no precedential value to the Pennsylvania Supreme Court's interpretation of "under color of state law" in Bentman. See, Wilson v. Garcia, 471 U.S. 261.

Finally, Petitioners maintain in the alternative that even if federal law were to apply, the lower courts erred by failing to follow certain precedents of this Court, to wit, Smith v. Allwright, 321 U.S. 649, reh'g denied 322 U.S. 769 (1944); Terry v. Adams, 345 U.S. 461, reh'g denied 345 U.S. 1003, (1953); American Party of Texas v. White, 415 U.S. 767 (1974); Moore v. Ogilvie, 394 U.S. 814 (1969);

Williams v. Rhodes, 393 U.S. 23 (1968); Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932), cited with approval in Reitman v. Mulkey, 387 U.S. 369 (1967); Ray v. Blair, 343 U.S. 214 (1952). These cases are readily distinguishable.

As now Circuit Court Judge Higginbotham observed in McMenamin v. Philadelphia County Democratic Executive, 405 F. Supp at 1000, a case virtually identical to the instant matter:

> [T]his case ... does not involve claims of racial discrimination in primary or general elections. See, e.g., Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1926), and Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875, 68 S.Ct. 905, 92 S.Ct. 2718, 34 L.Ed.2d 1 (1972). Nor does it involve the kind of geographical discrimination

> in the electoral process that the Supreme Court has, on numerous occasions, found unconstitutionally impermissible. See, e.g., Reynolds v. Sims, 377 U.S. 533, 566, 84 S.Ct. 1362, 1384, 12 L.Ed.2d 506 (1964); Gray v. Sanders, 372 U.S. 368, 381 83 S.Ct. 801, 809, 9 L.Ed.2d 821 (1963); cf. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691 7L.Ed.2d 663 (1962).

See, also, O'Brien v. Brown, 409 U.S. at 5 n.1. Because the instant matter does not involve claims of racial or geographic discrimination, Nixon v. Herndon and other such cases relied upon by Petitioners are patently inapposite.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Court deny the Writ of Certiorari.

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CERTIFICATION OF SERVICE

I, STEPHEN J. SPRINGER, ESQUIRE, certify that on December 31, 1992, I caused a true and correct copy of the within **Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit** to be served by regular first class mail on:

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STEPHEN J. SPRINGER

Dated: December 31, 1992

Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992
92-1040

James Barber, et al.
Petitioners,

v.
Michael Horsey,
individually, et al.
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONER JAMES BARBER ET AL.'S REPLY BRIEF IN FAVOR OF GRANTING CERTIORARI

1. POLITICAL QUESTION PRINCIPLE IS NOT A PROPER REASON TO DENY CERTIORARI.

Respondents answer to the Petition for Certiorari raised the alleged application of the "political question" principle. Respondent Horsey attempts to convert the political question doctrine, which is in reality a judicial deference to separation of powers, into a new form of political immunity for politicians.[1] Such was never the purpose of the political question principle, **Nixon v. Herndon** 273 U.S. 536, 540 (1927).

The modern formulation of the use of political question discretion by the court is

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[1] Although Respondents raised the issue in the United States District Court, it was not argued in their appellant brief and is therefore waived on appeal.

found in **Baker v. Carr** 369 U.S. 186 (1962). Briefly stated a federal court defers to rule on an issue on political question grounds when the court finds

> ... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.
> **Baker** supra p. 217.

More fully stated, the court looks to: the lack of existence of requisite factual information, the difficulty in obtaining that information, the necessity for uniformity of decision, the wider responsibility of political departments and lack of adequate legal standards, **Baker** p.217.

An examination of each of these elements of analysis shows that the case at bar is justiciable. The facts of the current case are simple and straightforward. The actions of Defendant Horsey are reviewable by the court in normal trial fashion. This is <u>not</u> a case of judicial review of whether large scale factual

allegations support or detract from some legislative or executive policy enactment.

The plain admission by the appeals and district court below that there is a patent divergence in precedent between state and federal courts shows that the uniformity of decision argument points toward hearing the case at bar, not avoiding it.

There is no lack of adequate legal standards as the Pennsylvania election code's adoption of the party rules are quite precise of what should have taken place in the facts at bar.

Finally and most importantly, this case is not a decision reviewing the wider responsibility of different political departments of government. This central consideration is why most, if not all, U.S. Supreme Court precedents employing the political question principle are limited to cases concerning separation of powers, particularly between the federal branches of government, guarantees of republi-

can government of the states, foreign affairs, and certification of the enactment of legislation. As Justice Brennan wrote:

> It is the relationship between the judiciary and the coordinate branches of the Federal Government, and the federal judiciary's relation to the States, which gives rise to the 'political question'... The nonjusticiability of a political question is primarily a function of separation of powers...
> **Baker**, supra p. 210

The court then summed up the doctrine,

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers.
> **Baker**, supra p. 217

The essential analysis of **Baker v. Carr** has been reaffirmed on several occasions by the United States Supreme Court, **Powell v. McCormack** 395 U.S. 486 (1969); **Gilligan v. Morgan** 413 U.S. 1, 10 (1973); **Goldwater v. Carter** 444 U.S. 996, 1002 (1979).

With the wave of a footnote (p. 8, n. 1 in Respondent Horsey's brief opposing certiorari),

Respondents claim the **O'Brien v. Brown** case does away with the numerous U.S. Supreme Court precedents defining what a political question is. First **O'Brien v. Brown** was not a decision on the political question issue. The issue was mooted by the passage of time and was not considered on those merits by the court. The case was remanded as moot, **O'Brien v. Brown** 409 U.S. 816 (1972). **Cousins v. Wigoda** likewise specifically stated that the court did not have the political question issue before it, **Cousins** 419 U.S. 477, 483 n. 4 (1) (1975). To argue, as Respondents try, that two mooted precedents overrule the line of precedent flowing from **Baker v. Carr** is to create a legal phantasm.

Respondent Horsey attempts, through the misleading use of the term "political," to transform political question into a kind of "political immunity." The "political question" precedents appropriately apply only to cases deferring to a separation of powers between the three federal branches of government. Members

of political parties are not free to violate election and civil rights laws because the perpetrator is politically active or a member of a recognized party. While it is a common misconception in the minds of some politicians that their possession of a small bit of political power places them above the law, the courts indisputably enforce the application of the law to all, powerful and powerless alike. Even the President of the United States cannot hold his political authority above the laws of our land, **U.S. v. Nixon** 418 U.S. 683, 706 (1974). So why should a Philadelphia ward leader be afforded a political immunity denied to even the President?

2. PROTECTION OF THE RIGHT OF POLITICAL ASSOCIATION FAVORS THE GRANT OF CERTIORARI.

Respondent Horsey's claim, that the ward leaders are immune from court review for violations of enforcement of both the Party's own rules and the Pennsylvania Election Code because of a federal right of political association, is patently false. First, as already listed in the numerous citations in Petitioner's brief for certiorari indicate, party primaries are not private party affairs when it comes to violating federal civil rights.

All of the cases cited by Respondents' answering brief, **Cousins v. Wigoda** 419 U.S. 477 (1975); **O'Brien v. Brown** 409 U.S. 1 (1972); **Eu v. San Francisco Democratic Committee** 489 U.S. 214 (1988), deal with direct conflicts between state law and national or state party rules. Such is not the case at bar in which Pennsylvania statute is in harmony with party rules.

Indeed, Pennsylvania incorporates the rules into law, 25 P.S. 2837. Rather, the case at bar is one in which the Respondent Horsey violated the First and Fourteenth Amendment rights of Petitioners Barber et al. by Respondent Horsey's violation of both party rule and state law.

The court here should extend the same protection to First and Fourteenth Amendment rights claimed by Petitioners James Barber et al. as has the Pennsylvania and U.S. Supreme Court and other federal courts have done. **Seergy v. Kings Co. Rep. Co. Committee** 459 F. 2d 308 (CA2 1972).

Refusing to allow the newly elected committeepersons to vote on the ward reorganization is nothing less than a denial of the vote of the majority of Democratic voters in each of the precincts that elected the committeepersons. This antidemocratic activity is to be weighed against the free speech and due process rights of the successfully elected

committeeperson which are suppressed by the denial of their votes.

The essence of the right of individual political association is to become politically active, to express a political opinion, to have that opinion weighed by the majority of voters, and to have those votes counted. **Reynolds v. Sims** 377 U.S. 533, 84 S.Ct. 1362, 126 L.Ed.2d 506 (1964); **Avery v. Midland County** 390 U.S. 474 (1968).

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear.... The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.
> **Reynolds v. Sims** 377 U.S. 533 at 561-562 (1964)

. It is in a total negation of the First Amendment right of political association to deny the vote count of the majority, to disenfranchise the successful candidate. Respondent Horsey's contention that they have a right to deny the majority its vote is not a protection of the right of political association, but its destruction. The right of free expression is not merely an individual right, but accumulates as the voice of the majority as well.

> The interests involved are not merely those of parties or individual candidates; the voters can assert their preference only through candidates of parties or both and it is this broad interest that must be weighed in the balance.
> **Lubin v. Panish** 415 U.S. 709, 716 (1974)

Rather than a step toward political freedom, Respondent Horsey's argument is a step toward arbitrary rule. The protection of the ideal of free elections, even on a grass roots level, is too important for this court not to rule in this case.

3. CONCLUSION.

The ultimate question should not be whether a judge is fearful of a politically controversial case and so grants a "political immunity" to small power brokers who break the election law of Pennsylvania. Rather the final analysis is whether the courts will enforce the Pennsylvania election law to prevent cheating. The blind eye that some courts have given to violations of election law does not make the violations self correcting. It only perpetuates wrongdoing and destroys the most fundamental of federal civil rights, the right to democratic elections.

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